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LEADING ARTICLES

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A Challenge to the Law ..... *Orvill C. Snyder* 257
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in Specifics ..... *Maurice S. Culp* 277
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JOURNAL of the MISSISSIPPI STATE BAR

VOL. IX FEBRUARY, 1937 No. 3

SAFE-GUARDING THE PEOPLE'S SAVINGS— A CHALLENGE TO THE LAW

*Orvill C. Snyder**

America's pride has always been an unexampled material progress which has opened the door of opportunity and spread the good things of life in the midst of her people more widely than has occurred in any other country at any time. According to the national faith, it is the industry and thrift of the private citizen that generates this material progress. Moreover, it is the practice of these two sovereign virtues that develops the steadiness of character, self-reliance, and alertness upon which the whole process of national and individual advancement, both material and ideal, depends.[1]

For the attainment of success by the venerated formula of industry and thrift, three conditions must exist: a chance to work, returns from that work leaving a margin above need for savings, and security of those savings. The first two of these conditions do not provide our subject. In a land of opportunity, it ought to be possible to assume that they exist; and, more pertinently, they make little sense without the third, since the efficacy of working and saving depends upon the security of accumulations.[2] Security of savings is, therefore, the central factor in individual success by means of industry and thrift. And it is of equal consequence as a matter of public policy.

Forms Which Savings Take

To consider the security of savings, it is necessary to canvass briefly some of the forms which savings take. There is first, of course, property involving physical control and use by the owner of specific physical things, which may be exclusive as in the ordinary

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[1]"What we need is thrift and industry . . . . Let everybody keep at work . . . . We have come to our present high estate through toil and suffering and sacrifice." President Coolidge, quoted in 2 Beard, The Rise of American Civilization 700.

[2]"The Law of Growth—One of the most important truths to learn is the law of growth. Ideas grow, nations grow, character grows. The great fortunes of the world have grown from little beginnings. Make your beginning now in a savings account." (Sign in the window of Lake Shore Trust and Savings Bank, North Michigan Ave., Chicago, October 24, 1936). This depends on security of accumulations.

possessory estates in land or ownership of chattels, or in common with other persons as in profits *a prendre*. Savings also take the forms of rents, mortgages, and trusts, where there are identifiable physical things but beneficial ownership is divorced from physical use of possession. The primordial characteristic of property, physical control of physical things, is still more widely removed from beneficial right when rents and mortgages are placed in trust, and even when physical things are placed in trust if the trustee has power to invest and re-invest. Here there is no specific physical thing with respect to which the beneficial owner has a continuing claim; the object of his property is an ideal mass. Corporate stocks present an analogous arrangement. In addition, savings take still other forms which completely depart from the traditional form of property; namely, mere contract rights, in which no specific physical or ideal thing, as source of income or as income, is identified. Those forms of savings in which the saver has physical control and use, exclusive or concurrent, or physical things may be denominated, it is believed without inaccuracy for present purposes, tangibles. Those forms in which the saver does not himself have physical control and use of physical things may be called intangibles.

The trend of savings to intangible forms is marked and growing.[3] True it is that tangible property is still open to most savers

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[3]In 1927 Mr. W. I. King published an estimate of the total wealth and of its distribution in the United States. His figures as of December 31, 1921, are:

Total wealth	$281,159,000,000.00
Corporate securities	68,123,000,000.00
Leased real estate	40,775,000,000.00
Governmental obligations	24,787,000,000.00
Total of three types of intangible rights	133,685,000,000.00

See King, *Wealth Distribution in the United States* (1927) 22 J. AM. STATISTICAL ASS'N 135-53.

The Census of 1930 gives the following figures on farm ownership:

Land area of U. S.		1,903,216,640 A
Land in farms		
Owner operated	372,449,683 A	
Part-owner operated	245,926,107 A	
Tenant operated	306,409,324 A	
Manager operated	61,985,902 A	
Total		986,771,016 A
Total value of all farm land and buildings		$47,879,838,358.00
Mortgages (owner operated farms only reported)		
Free from mortgage		178,137,880 A
Mortgaged		170,715,722 A
		348,853,602 A
Total value of land and buildings of farms reported free from mortgage		$ 9,617,604,482.00
Total value of land and buildings of farms reported mortgaged		$10,402,311,103.00
Amount of Mortgage debt		$ 4,080,176,438.00

but opportunities are narrowing; the instrumentalities of manufacturing and trade are increasingly gathered into large aggregates; small holdings in the way of shops and stores are becoming fewer. This process seems inevitable. Machine production and distribution require massed equipment. Production and distributing agencies, able to assemble these physical plants, if not the tremendous super-corporations yet aggregations too large for individual means, will, by sheer efficiency take over more and more of the areas of business from individual operators. Any saver may acquire a home for his own occupancy, but a man with a house and no income speedily faces want; he may acquire other dwelling houses and small lots and achieve an income by renting or selling at a rise, but the more profitable business buildings and apartment houses are beyond the efforts of most. Productive tangible property in the shape of farms is widely available; but available, the trend of population for decades shows, for a diminishing proportion of savers. Mortgages and the like drift into the hands of intermediaries and the saver has trust certificates or other credits. Savings go largely into certificates of deposit, savings accounts, bonds, corporate stocks, insurance, annuities. Besides savings taking forms in which beneficial right is separated from control of the productive instrumentalities out of which expectations must be realized, savings of tangible form are increasingly delivered temporarily into the control of servants, bailees, and agents; and likewise the symbols and instruments of intangible rights are placed within the power of other persons.

The Shift in Character of Property Rights

The outstanding forms of modern savings work a reversal in the character of property rights, in the nature of acts of expropriation, and in the domain of liberty.[4] Property rights become posi-

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It is to be noted that a very high percentage of the acreage in owner operated farms is included in the report on mortgage indebtedness. The amount of savings invested in farms through the intangible form of mortgages is, among farms reported, 40 per cent of the value of which latter represent savings in strictly corporeal farm. There seems no reason for supposing that the owner operated farms not reported, and the part-owner operated, tenant operated, and manager operated farms would make any different picture. If different, the difference would probably be in the way of decreasing the proportion of unencumbered corporeal property, and increasing the intangible investment.

In 1930 the Association of Life Insurance Presidents reported that the fifty-two legal reserve life companies holding from 91.6 to 98.4 of admitted assets of U. S. legal reserve companies held, as of September 30, 1930, farm mortgages of the value of $1,897,286,000.00. Or savings in this one intangible form based ultimately on farm land bulked 25 per cent as large as savings in the form of corporeal property in farm lands owner operated and debt free. See Ass'n of Life Ins. Pres., Proceedings, 1930.

[4]More is involved than splitting ownership. Something is added. In complete ownership, so called, the duties enjoined are negative. They are to stay

tive instead of negative; acts of expropriation become negative instead of positive; what in another setting is liberty becomes rapine; what otherwise is the essence of property and enterprise becomes destruction of the ethical foundations of the property system. The saver, physically controlling and using physical things, places his confidence in himself, in his own capacities and efforts to realize from them the fruits which he desires and expects. He is protected by the law's command that others stay off. In more exact words, legal protection is afforded by the imposition on others of negative duties to refrain from interference with his possessions. But when savings take intangible forms or when in any form they are delivered into the power of others, the factual expectations of future enjoyment grow out of a confidence that these other persons will do those affirmative acts which will bring the expectations to fruition. Legal protection, becomes, instead of the maintenance of the negative rights *in rem* of primitive property, the effective sanc-

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off, let alone, refrain. There is no duty on the part of any one having property to take care of anything so as to preserve it or to use anything so as to produce fruits. The one who has the duties must refrain from molestation. The one having rights need do nothing. The latter, of course, has liberty, in the Kocourekian sense, or ("chameleonhued" term) privilege in the Hohfeldian sense, to go on the physical thing, to walk on it, to use it, to abuse it, to work it, at it and with it to produce fruits; but he is under no duty to do so. In the intangibles, there are duties, in the legally compulsive sense, to take care of, and, in many instances, to make use of to produce fruits. The introduction of positive duties of care and use, and other exertions into the property complex is revolutionary.

Property is a complex which may be decomposed into two elements, "factual interest" and "legal protection." See these terms used by Walter Wheeler Cook, *Rescission of Bargains Made on Sunday* (1935) 13 N. C. L. Rev. 176, 177, n. 51. In Kocourek, Jural Relations (1927) c. 18, the "infra-jural" relation and the "thing" are distinguished from the "jural relation." The present writer is disposed to regard the term "property" as correctly used only with the inclusive meaning embracing both factual interest and legal protection, infra-jural relation and jural relation. When only the components are indicated, the term "property rights" may be utilized.

The differences both as to the factual realization of expectations and as to the legal protection of these expectations between tangibles and intangibles have been noted but not elaborated. In the case of tangibles, the "owner" produces the fruits by his own exertions. "The owner of a house or horse enjoys the fruits of the ownership without the aid of any other person." See Ames, *Purchase for Value Without Notice* (1887) 1 Harv. L. Rev. 1, 9; Lectures in Legal History (1913) 253, 262 (quoted in Cook, *supra*, at 178, n. 56). In the case of intangibles, the fruits are produced by the exertions of some other person. In the case of tangibles, the legal protection is addressed to establishing the owner's freedom from interference by others with his own exertions. In the case of intangibles, legal protection is addressed to compelling the positive exertions of other persons. "The only way in which the owner of an obligation can realize his ownership is by compelling performance by the obligor." Ames, *loc. cit. supra*. The thought can be followed further in Hohfeld, Fundamental Legal Conceptions 78, n. 34; and in Kocourek, Jural Relations (1927) c. 18, especially pp. 323-334 on Ownership and Property.

It seems to the writer that here lie the fundamentals of property classification.

tioning of obligations of persons in whom trust has been reposed. The task of the law is not so much the let-alone shielding of the saver's own activities from outside molestation as it is the positive ordering of the activities of other persons to the end that his lawful expectations may be realized through their legally sanctioned conduct. The type of "unjust expropriation" to be feared is breach of trust more than trespass, embezzlement more than larceny. It is only because the obvious is most readily overlooked that these differences are infrequently appreciated. The old corporeal forms of property rush to mind when the subject is broached; the ideas of and concerning them linger in the background and color, often deceptively, almost all thinking about accumulations.

The Place of the Corporation in Savings

The arresting fact in this development, is the place which corporations have. The saver guards his home, his family, and affairs with a rainy-day fund in the way of insurance or a savings account; he must keep current funds on deposit for daily transactions; and, even if his object is to acquire tangible property, he accumulates the means by building up his savings account. In every instance, it is practically certain that he deals with a corporation. Sharing-the-wealth by spreading the ownership of stock and profits among employees means more savings in the corporate form.[5] The development of cooperatives is the extension of the corporate device. When the special character of savings as "something to live on when the saver is old, disabled, or unemployed" and his ordinary income is cut off is borne in mind,[6] the crucial place in savings of the corporate forms in reëmphasized. The need of income-producing savings is, in this connection, obvious; and productive instrumentalities tend to aggregates beyond individual means. Unless the saver of small and moderate-sized accumulations is to be deprived

[5]See Chicago Journal of Commerce, September 22, 1936, Mr. Benson on old age security by private thrift—more reliance on the corporation.

[6]"As far as the mass of mankind are concerned, the need which private property other than personal possessions does still often satisfy, though imperfectly and precariously, is the need for security. To the small investors, who are the majority of property-owners, though owning only an insignificant fraction of the property in existence, its meaning is simple. It is not wealth or power, or even leisure from work. It is safety. They work hard. They save a little money for old age, or for sickness, or for their children. They invest it, and the interest stands between them and all that they dread most. Their savings are of convenience to industry, the income from them is convenient to themselves. 'Why,' they ask, 'should we not reap in old age the advantages of energy and thrift in youth?' And this hunger for security is so imperious that those who suffer most from the abuses of property, as well as those who, if they could profit by them, would be least inclined to do so will tolerate and even defend them, for fear lest the knife which trims dead matter should cut into the quick. They have seen too many men drown to be critical of dry land, though it be an inhospitable rock." Tawney, The Acquisitive Society (1920) 72.

of this most beneficial form of savings, with consequent discouragement of his industry and thrift, he must be able to turn to corporate forms of investment which afford him participation in the fruits of productive property, either directly or through savings institutions which do invest in them. Hence, consideration of the security of savings can be confined to the security of savings in corporate forms and yet embrace the controlling part of the whole subject.[7] The saver's confidence is placed in corporations, that is, in substance in those who control and manage corporations. His safety depends on how well they can and do acquit themselves of the trust.

The timeliness of attention to this subject needs little comment. Shocks have been given to the faith of the saver in the corporate system. That his just expectations, wilfully inspired to induce his trust, have often been left unfulfilled is too true. Closed banks, defaulted bonds, and vanished stocks are neither pleasant memories nor happy auguries.

These disappointments have given rise to a curious controversy. It is claimed that the troubles which jeopardize the investor's (saver's) expectations result from inherent and ineradicable weaknesses of the corporate system or from world conditions, governmental policies, and economic law, confronted with which those who control and manage corporations are powerless except in a meagre and ineffective degree. The voluntary activities of those who control and manage are supposed, therefore, to have little to do with the losses. If the losses were insignificant and the hazards negligible, the matter could be passed over; but such an

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[7]The Report of the Comptroller of the Currency covering the year ending June 30, 1934, shows the amount of savings invested in Building and Loan Associations, Stock Savings Banks, Mutual Savings Banks, and savings departments of State Commercial Banks, Loan and Trust Companies, and National Banks then to have been $27,555,873,676.00. The Association of Life Insurance Presidents estimated the assets of forty-nine companies holding from 91.6 to 98.4 per cent of all U. S. legal reserve companies, as of December 31, 1935, to be $23,200,000,000.00. (See PROCEEDINGS, 1935). These types of corporations are savings institutions in the strict and conservative sense. Savings in corporate forms represented here amount to 15 or 20 percent of the total national wealth. These figures take no note of the assets of industrial and public service corporations, except as their securities are held by the types of corporations listed; nor of the vast sums which might be denominated public savings held by non-profit corporations.

Two-thirds of the industrial wealth of the nation is probably held through the corporate device. Two hundred largest non-banking corporations had in 1930 assets of around $81,000,000,000.00. Of course securities of these corporations are held by the "savings" institutions above listed; but not all of their securities are so held. See BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1934) preface and bk. 1, c. 8.

assumption is contrary to the fact. The contention must be accepted or rejected.[8]

Its acceptance presents choices which, it seems safe to say emphatically, the American people are not prepared to make. If the losses in the bulk are inevitable, we must console ourselves to facing renunciation of security of savings as an element of individual enterprise and an instrument of public policy or junking the corporate system, or both. It is too much to expect the economic seas always to be calm. We must give up embarking treasure upon them and in turn accumulating any treasure, or we must have pilots who can navigate these seas as they are, world conditions, economic law, and all. If the masters of the corporate ship cannot do this but must have the seas made still for them by others or in storms have others bring in their ship, the introduction of those others means another and different system from the one we now know as individual enterprise and private property. The contention is a plea that those who control and manage corporations are only fair weather sailors and that pretensions on their part to a right to ask people to trust them are the acts of fools or knaves. Furthermore, acceptance of the contention necessitates the conclusion that the law on corporate management is a thing of little and dwindling importance, and that the moral convictions underlying this law are grounded in falsity and error. But the cases in the books have much to say about the duties and proper functions of those who control and manage corporations. Are we to suppose that the established principles judicially announced are but delusive nothings? No more than we are prepared to advocate giving up the security of savings or getting rid of the corporate system. And there seems no way of treating what these cases say, except in a spirit of despair or of levity, if the matter is foreclosed by assuming that the duties announced cannot be performed or that the bulk of the losses will occur anyway and their performance or non-performance, therefore, does not mean much. It ought to be safe to rest here, but a glance at a few facts will do no harm.

The Business Cycle

In economic history and economic theory, the preëminent phenomenon is the business cycle. The years of 1785, 1819, 1837, 1857, 1873, 1893, 1907, and 1929 are as prominent in our history as 1776, 1812, 1845, 1861, 1898, and 1917. The bane of the business cycle lies in the stages of intensification to crisis, the crisis, and the crash. Here is where the losses which threaten the security of ac-

[8] Those of us who believe in the basic principles of what has been often referred to as the American System of individual enterprise and private property are constantly challenged by contentions which emanate from or serve the ends of those who advocate what popularly are called alien theories.

cumulations and shake faith in the system of individual enterprise and private property are caused and occur. The recurring story is that "speculation becomes rampant," the tension increases, and then "the over-extended fabric breaks." What part do the voluntary activities of those who control and manage corporations have in the processes of intensification and in the precipitation of the crash?

The Crisis

"As the boom cumulates in intensity, speculative investments in goods of all kinds increase in volume. Much new bank credit is used for this purpose. There is intense speculation in shares of stock of corporations; in land, both urban and rural; in permanent capital equipment; and in circulating-capital goods of all kinds." "The end of the boom is certain before it starts," but business men are endeavoring " 'to play the game' of speculation and 'get out from under' before the crash comes." "Speculation becomes rampant." This is the danger, not that there are oscillations; they, like the poor, are doubtless always with us. "Man cannot control economic laws," but "he can at least be conscious of them and he can control his own conduct." It is the "whip-up" to the frenzy which causes the crisis and prepares the stage for the break. What is the "whip-up"? It is the expansion of credit and speculation by those who control and manage national savings amassed in corporations. This control "gives them the power which they would not otherwise have." This power is what enables them to intensify the boom; and this power is exercised not infrequently for "personal motives," "to make advantageous contracts . . . . in which they are interested" and "to give employment to relatives at high salaries," to pour "funds under their control . . . . into all sorts of harebrained schemes," to issue "securities in extravagant quantities," "to pay dividends out of capital" and "by misleading reports . . . . to give a semblance of extraordinary value to securities . . . . in fact worthless," to make "loans to officers and directors" and to "enterprises in which officers and directors were interested," to make systematic attempt "to control legislation" and to "influence public opinion,"—through all of which many directors and officers consider "their positions too important and their time too valuable to spend on matters of detail . . . . to sacrifice social pleasures for business motives." It is hard to read these, the sombre, pages of American history without suspecting that the dangerous phases of business cycles might not have occurred, had there not been the voluntary activities of that part of those who control and manage the massed national savings invested in corporations who disregarded the interests of the beneficiaries of their trust and went out

for quick gains for themselves;[9] without being persuaded that it is the activities of these men which drag the bulk of businesses, business men, and the citizenry generally into the vortex of speculation.[10]

The Crash

The boom accelerates and rises to its climacteric, which, following preliminary and scattered failures, is the crash of some large corporation[11]—like that of the Ohio Life Insurance and Trust Company in 1857, of Jay Cooke and Company in 1873, of the Philadelphia and Reading or the National Cordage Company in 1893, of the Knickerbocker Trust Company in 1907, of the Bank of United States in 1929—from which "terror" flows "in widening waves over the country,"[12] starting "runs" which pull down other weakened

[9]Commissioner Humphrey's Creed recited before the United States Chamber of Commerce, May 20, 1925: "We do not believe that success is a crime. We do not believe that failure is a virtue. We do not believe that wealth is presumptively wrong. We do not believe property is presumptively right. We do not believe that *industry, economy, honesty,* and brains, should be penalized. We do not believe that *incompetency, extravagance, idleness and inefficiency* should be glorified. True, we will give closer scrutiny to big business than to small business because of its greater power for good or evil. We believe that 90 per cent of American business is honest. We believe that 90 per cent of American business is anxious to obey the law. We want to help this 90 per cent of honest business. We want to *control or destroy the 10 per cent* that is crooked. In this endeavor we want your help. We hope to deserve it."

[10]"The inevitable collapse ensued in 1837, and the country passed through another great industrial and financial crisis.

"One of the causes of the panic of 1837 was a disordered banking and currency system . . . . The crises of 1785-86 and of 1819 would probably have occurred however sound a system of banking and currency the country might have had. But since the beginning of the nineteenth century all financial crises have been closely related to the conditions of the banking business, and as a matter of fact, unsound banking practice has been true because since the early years of the nineteenth century credit operations in business have been conducted largely through banking institutions rather than directly between individuals. Bank credit superseded ordinary book credit." VAN METRE, ECONOMIC HISTORY OF THE UNITED STATES (1921) 304.

[11]"In August, 1857, the Ohio Life Insurance and Trust Company, which had loaned several million dollars to unsuccessful railroad corporations, failed. Its failure brought failure to a number of other business establishments . . . ." VAN METRE, *op. cit. supra* note 10, at 353.

[12]"Chap. XV—'Saving the Country' Again—Panic of 1907.

"In February, 1907, the stock market began to crumble . . . . " WINKLER, MORGAN THE MAGNIFICENT (1930) 260.

"The Summer passed with growing uneasiness . . . . The huge Westinghouse Electric Company failed. The New York street railway combination went into receivership. Charles W. Morse's attempted consolidations at Atlantic coast shipping collapsed." *Id.* at 262.

"Morse, whose morals were even more sebaceous than those prevailing in the period, was the inventor of 'chain-banking.' This was a simple and audacious scheme of employing stock of one enterprise as collateral on which to borrow money for the purchase of another. Morse and a group of associated gamblers were pouring funds under their control in the Mercantile Bank, the Knickerbocker Trust Company and other depositories into all sorts of harebrained schemes.

"It was evident that many were turning their investments into cash, and

corporations and "freeze" the assets of even soundly managed organizations, until "great business losses," unemployment, pain and suffering, deprivation of homes and savings, economic confusion and social and political unrest are wide-spread. The corporation involved in the climacteric crash is one which has been grossly mismanaged and in many, perhaps in most, cases criminally mismanaged. The weakened corporations immediately pulled down, making the devastation general, also evidence mismanagement of the more unsavory kind.[13]

Turning to corporate failures as instances and irrespective of business cycles, we find that when a building and loan association,[14]

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hoarding the cash . . . . " *Id.* at 263.

"The climax came in mid-October." *Id.* at 264.

"In a gorgeous chamber adorned with the portraits of Washington and Hamilton, the leaders of the national banking system met, denounced as piracy the new method of using bank funds, and resolved that not another dollar should be given to assist the crippled institutions until Morse, Heintze, the Thomases, and all their associates and confederates should retire . . . .

"The worse seemed to be over. But the drama was only beginning.

"By the end of the week, the Clearing House investigation disclosed an alarming state of affairs in the Knickerbocker Trust Company, largest institution of the Heintze-Morse chain . . . . " *Id.* at 265.

"Word came that the National Bank of Commerce had refused to continue clearing checks for the Knickerbocker . . . . " *Id.* at 266.

"Amid scenes of furious anger, with men and women struggling desperately at the doors and squads of police fighting to maintain order, the Knickerbocker suspended business . . . .

"That seemed to let hell loose in New York.

"Next morning [this was Wednesday, October 23] haggard and terrified depositors confronted the cashiers of almost every trust company. Panic spread. The National Bank of America went down. Terror swept the street and began to flow in widening waves over the country . . . . " *Id.* at 267.

"Morgan emerged from the panic of 1907 with prestige enhanced immeasurably . . . . " *Id.* at 277.

[13]The story of the development of crises and of the causes of climacteric crashes through speculative activities in which the schemes and failings of those who control and manage corporations are always a central factor can be continued in the following: VAN METRE, *op. cit. supra* note 10, at 164, 245, 390, 475, 492; ADAMS, ECONOMICS OF BUSINESS CYCLES (1925) 220, 231, 247, 252; ADAMS, PROFITS, PROGRESS AND PROSPERITY (1927) 137, 139, 153, 163, 164, 165, 173; *The President's (Hoover) Conference on Home Building and Home Ownership* (1932) 2 HOME FINANCE AND TAXATION 89, 90, 91; BREMER, AMERICAN BANK FAILURES (Studies in History, Economics and Public Law, Columbia University, No. 412, 1935) 99, 101, 102, 106-7; Flynn, *Michigan Magic* (Dec. 1933) 168 HARPER'S MAGAZINE; Rep. Comm. on Banking and Currency, U. S. Sen., 73d Cong., 2d Sess. (1934) pp. 11-19, 55-68, 101-109, 163, 185-210, 231-319; DERVING, THE FINANCIAL POLICY OF CORPORATIONS (3d ed. 1934); POWELL, DEPOSITORS PAID IN FULL (1931); Morse v. U. S., 174 Fed. 539, 98 C. C. A. 321, *cert. denied* 215 U. S. 605, 30 Sup. Ct. 406, 54 L. ed. 346 (1909); People v. Warder, 231 App. Div. 215, 247 N. Y. S. 60 (1930); People v. Marcus, 261 N. Y. 268, 185 N. E. 97 (1933); House v. U. S., 78 F. (2d) 296 (C. C. A. 6th, 1935), *cert. denied*, 269 U. S. 608 (1935).

[14]Berge, *Recent Tendencies in Building and Loan Practice* (a thesis submitted to the faculty of the School of Commerce, Northwestern Univ., May 18, 1934) pp. 60, 61, 74, 79; *Reports* (of H. F. Cellarius, Sec.-Treas U. S. Bldg. & Loan League, 1930) BUILDING AND LOAN ANNUAL 544; *Id.* (1931) 921-22; *Id.*

a life insurance company,[15] a trust company, or a savings bank[16] becomes involved in financial difficulties, the cause is usually not far to seek. It is likely to be mismanagement, deliberate and in the face of danger signals, characterized by egotism and desire for personal gain regardless of cost to the beneficiaries of the management's trust, either in the corporation which fails itself, or in some other corporation or corporations which has brought about "economic conditions" which the present corporation is unable to weather. The situation in industrial corporations is not different.[17]

The Need of Stability

The economic world is a "complicated flux of things." As Dean Donham has pointed out the great need is "meeting this problem of change," in a way that recognizes "the overwhelming importance of routine or stability" and of "security," and this can be

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(1932) 381; *Id.* (1933) 373-4; *Id.* (1934) 421; *Id.* (1935) 442-3; Baugher v. State, 15 Ohio L. Abs. 328, 418 (1933), *motion for leave to file overruled,* Sup. Ct. Feb. 2, 1934, No. 24571.

[15]The Bible of Life Insurance (1932) (a complete photographic reprint of the original studies and official reports of Elizur Wright, published by The American Conservation Co., Chicago); 10 Report of the Armstrong Committee (printed under the title of Report of the Legislative Insurance Investigating Committee, James McKeen and Chas. E. Hughes as counsel, Feb. 22, 1906) 9 *et seq.;* Editorial, Bests' Insurance News, Oct. 2, 1933.

[16]Bennett, The Story of Mutual Savings Banks (1924) (a course of lectures given before the Boston Chapter of the American Institute of Banking in the autumn of 1923); Herrick, Trust Companies, Their Organization, Growth and Management (1915) 24 (composed of a series of articles which appeared in The Bankers Magazine of New York during the years 1904 to 1907); Annual Rep. Comm. Banks, for year ending October 31, 1921, Mass., Pub. Doc. No. 8, p. v. *et seq.; In re* Ponzi, 268 Fed. 997, 280 Fed. 193, 281 Fed. 973, 283 Fed. 124, 4 F. (2d) 25 (1920-25).

[17]"The direct cause of failure in every instance was the deflection of working capital to the payment of interest and dividends. . . . Every corporation discussed in this volume paid out interest or dividends in the face of falling earnings, and no need have suffered serious financial difficulties had the amounts paid in interest and dividends been conserved . . . .

"These were the direct causes. They do not explain, however, the underlying conditions that led to financial disaster . . . .

"Without attempting to offer an exhaustive list of the personal causes of failure, one can see clearly at least six, every one of which, in varying degree, showed the difficulty of obtaining a sufficiently high degree of business ability to manage a large consolidation of manufacturing plants. (1) Foremost, perhaps, was *the diffusion of responsibility* . . . . (2) Lack of knowledge of individual employees. (3) *Lack of loyalty of officers and directors* . . . . Personal motives easily supplanted any feelings of responsibility they might have toward the great body of stockholders. As directors they were tempted to burden the consolidation with useless plants at personal profit, or to make advantageous contracts with other companies in which they were interested, or give employment to relatives at high salaries. They were tempted to speculate in materials in such wise that the burden of loss fell on the corporation, or to make purchases and sales of the corporations' securities based on knowledge exclusively their own . . . . (4) Lack of attention to the *laborious parts of the business by the higher officials* . . . . (5) *Prejudice of customers against improved methods* . . . . (6) *Prejudice of customers against 'trusts'* . . . . " Dewing, Corporate Promotions and Reorganizations (1914) 557-60.

done only by fixing as many variables as possible "with sufficient accuracy for limited periods of time."[18] Apparently, one of the most dangerous of these variables is the activities of that part of those who control and manage corporations who voluntarily speculate with corporate assets for their own gain. Perhaps this is the primary hazard; for, unless it is remedied, all other efforts may go for little or naught. In passing it is to be noted that, if this sort of activity could be "fixed" or "stabilized," doing so would not in any way militate against "pioneering" by skilled, able, and honest managers; but, in fact, would free them from embarrassing suspicions and help them in addressing their talents and energies to the many pressing tasks to which they are now unable to give their full attention, since their legitimate operations are too often jeopardized and disrupted by the confusion produced by the operations of the former. These considerations raise many questions, the most important of which, from the legal point of view, may be put, as follows: Is the law concerned with the matter? Ought the law to give protection to the savings involved? Can the law afford any really effective protection?

The investor's (saver's) interests are property, or at least have been assimilated to property;[19] and we have the most reputable assurances that the law is concerned with "the presuppositions as to justice and economic need which, being in the minds of lawyers, color their application of the common law system from age to age."[20] Traditionally, the security of property has, among us, ever

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[18]DONHAM, BUSINESS ADRIFT (1931) 7, 9, 15, 48, 107, 153-55; and see especially the introduction by Alfred N. Whitehead.

[19]A few references, among many, are: Dissent of Justices McReynolds, Butler, Sutherland, and Van Devanter in Norman v. Baltimore & O. R. R., 294 U. S. 240, 55 Sup. Ct. 407, 79 L. ed. 885 (1934), citing Lynch v. U. S., 292 U. S. 571, 579, 54 Sup. Ct. 840, 78 L. ed. 1434 (1934); Eldredge v. U. S., 31 F. (2d) 924 (C. C. A. 6th, 1929); Chemical Foundation, Inc. v. E. I. DuPont de Nemours & Co., 29 F. (2d) 597 (Del. 1928); Wyeth v. Crooks, 33 F. (2d) 1018 (W. D. Mo. 1928); Atkin's Estate v. Lucas, 59 D. C. App. 151, 36 F. (2d) 611 (1929); Appeal of Beach, 107 Conn. 1, 138 Atl. 905 (1927); State v. Greer, 88 Fla. 249, 102 So. 739, 37 A. L. R. 1298 (1924); New York Trust Co. v. Royal Indemnity Co., 233 App. Div. 408, 253 N. Y. S. 154 (1931); Davis Laundry & Cleaning Co. v. Whitmore, 92 Ohio St. 44, 110 N. E. 518 (1915); State v. Fraley, 71 W. Va. 100, 76 S. E. 134, 42 L. R. A. (N. S.) 498 (1912). See, also, NOYES, THE INSTITUTION OF PROPERTY (1936).

[20]RESTATEMENT, CONFLICT OF LAWS (1934) § 4, com. b.

To the writer's mind, the most complete demonstration that the law is concerned with the practical matters of human conduct is Kocourek's careful and thorough-going analysis of jural phenomena: "The law functions only through human conduct, and, accordingly, it looks solely to *future* acts." KOCOUREK, *op. cit. supra* note 4, at 3. "Acts, together with events, are the sole course of legal phenomena. They are the dynamic force through which jural relations are brought into existence, are modified, and are extinguished. Since, however, the law governs only conduct, i.e., future acts, and has no influence on events (the non-willed happenings of nature) our examination is restricted to acts (occurrences subject to control by the human will)." *Id.* at 5. "It has a

in the most respectable circles been regarded as the foremost object of government and law.[21] There is, of course, a "fashion of intellectual defamation" which imputes to the exponents of property the creed that "business is business"; "that the individual is absolute master of his own,[22] and, within the limits set by positive law, may exploit it with a single eye to his pecuniary advantage, unrestrained by any obligation to postpone his own profit to the well-being of his neighbors, or to give account of his action to a higher authority"; "that business affairs should be left to be settled by business men, unhampered by the intrusions of an antiquated morality or by misconceived arguments of public policy."[23] But it must be remembered that the "splendid achievements of practical energy and technical skill" have been possible only through "diligence, moderation, sobriety, thrift," not through the depredations of the "less scrupulous;" and that the practice of these virtues presupposes the validity of the Eighth Commandment. Anyway, we have here rights "within the limits set by positive law;" and no one

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meaning which is technically restricted, yet in a wide sense it covers the whole field of jural relations . . . . The central idea of law in a formal sense is force, power, dominion. This leading concept is carried down into all technical operations of the law." *Id.* at 12, 13. See, also, especially, c. 16 on Acts and c. 18 on Things. This inquiring conceptualist, and so many conceptualists do not seem to be inquiring, presents a technique for the student and practitioner of the law-in-action, and makes a complete answer to the thoughtless assertion that the law is reason divorced from the thorny facts of workaday life.

[21]"From these passages it is evident; that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property. Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact." Vanhorne v. Dorrance, 2 U. S. 304, 310, 1 L. ed. 391, 394 (1795).

"The great and chief end, therefore, of men uniting into commonwealths and putting themselves under government is the preservation of their property." LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT, cc. 9, 11. "The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence." JOHN ADAMS, 6 WORKS 9. "The great object of government is the protection of property at home, and respect and renown abroad." WEBSTER, WORKS: ADDITIONAL SPEECHES 220. "Man has a natural right to produce and acquire property . . . . " Horace Greeley, The Tribune, Apr. 24, 1849. See, also, THE FEDERALIST, No. 10 (Madison);1 & 2 PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT, *passim;* and Holdsworth, *The Importance of Adam Smith's Wealth of Nations in English Legal History* (1935) 2 U. OF CHI. L. REV. 533.

[22]It is to be observed that the doctrine of *laissez faire* has no application where a person is claiming to do what he likes not with his own but with other people's property. Those who control and manage corporations are always dealing with the property of others. "The law is a system for the limitation of powers." See KOCOUREK, JURAL RELATIONS (1927) 15.

[23]See TAWNEY, RELIGION AND THE RISE OF CAPITALISM (1926).

has ever accused the property system of lack of insistence upon the morality of respecting vested property rights.

Our third question is not so easily disposed of. It has been said that "a critical examination of the nature of the legal principle involved . . . . tends strongly to dispel any high degree of optimism with regard to the future." "If trustee-ship for absentee investors, in addition to being an ideal having little emotional appeal to managers, is an ideal that is losing ground in the community generally and if signs are multiplying that our economic order is evolving away from it, the prospect of its effective enforcement as an interim legal rule of conduct is not encouraging."[24] Also it has been asserted that "the recurrence of depressions and unemployment emergencies of anything like the serious nature of our current problem must be prevented if capitalistic civilization is to endure,"[25] and it has been hinted that we are "going on the rocks." The present writer hazards no guess as to the validity of these suggestions but merely recites that they have been made. But it is clear that an outburst of righteous indignation or a "show of intellectual calm does not altogether dispose of the possibility that they are sound.[26] However, the Constitution was adopted as a result of economic depression in 1785-86 and we seem pretty well committed to the idea that law "can do something about it." Pessimism, in this connection, strikes at the fundamental ethic of the property system[27] that accumulations must be protected to encourage and defend the primary virtues of industry and thrift; its gloomy counsels must be put aside until the evidence is much more

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[24]See Dodd, *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?* (1935) 2 U. OF CHI. L. REV. 194.

There is a comfortable theory that the ills of the economic world must be left to the mercies of "economic laws" which by the pain and mental anguish of depression "eradicate the speculative fever and restore a greater measure of honesty and fair dealings." See ADAMS, ECONOMICS OF BUSINESS CYCLES (1928) 236 *et seq.* Two questions arise: Can the system stand the medicine? How does this attitude harmonize with the tenet of security of property?

[25]DONHAM, *op. cit. supra* note 18, Foreword, vii.

[26]See Ayres, *Moral Confusion in Economics* 45 INT. J. ETHICS 170.

[27]Tawney's great book (see note 23 *supra*) elucidates the truth that the dynamic qualities of the system of individual enterprise and private property are inseparable from conviction made clear-cut and dynamic by the ethics of Puritanism. It is not surprising that this is so. What could persist very long without definite ethical justifications? It makes no difference whether one agrees with these convictions or not; the actors did. If they had not, their courage would have been paralyzed and their operations confused. The writer confesses to some partiality for these beliefs.

As a beginning to consideration of the inter-relations of law and morals, one can start with the following: Snyder v. Warford, 11 Mo. 513, 515, 49 Am. Dec. 94 (1848); *In re* Kirby, 10 S. D. 322, 338, 414, 416, 73 N. W. 92, 39 L. R. A. 856 (1897); 2 WESTERMARCK, THE ORIGIN AND DEVELOPMENT OF THE MORAL IDEAS (2d ed. 1926) cc. 28, 29; KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW (1930) 121-36; DEMOGUE, ANALYSIS OF FUNDAMENTAL NOTIONS (Modern Legal Philosophy Series) 364, § 206 *et seq.*

overwhelming than it threatens to be. With respect to the rule of trusteeship, we can agree that "abandon it . . . we dare not." With the surmise that "enforce it with more than moderate success, it is to be feared we cannot" we are equally ready to disagree.[28]

Four Methods

The writer at least is persuaded, therefore, that inquiry into how the law addresses itself to the task would be justified and profitable. There seem to be four ways: (1) by implementing and facilitating self-help, (2) by providing civil remedies, (3) administrative regulation, (4) by criminal prosecution. Attention will be concentrated upon the fourth method. In doing so, no thought need be entertained of disparaging any of the other methods, or of denying their place, function, or usefulness. The choice turns upon two points: The efficacy of all the other methods depends ultimately upon support by the fourth. The fourth method has been largely neglected in critical and sustained considerations of the general problem, and this neglect has relegated it to the character of a sort of disreputable outlet for "paroxysms of fury" rather than that of a definitive and calculated instrument.

(1) *Self Help*

Probably the two principal devices coming within the first method are voting rights, whereby investors can participate in selection of directors, and bonding of employees and officers. The really effective protection which can come from these devices is limited. The important corporations have many investors. This is particularly true in the typical savings institutions even where the total of assets is not very large. Many investors are of classes not usually granted voting rights. To grant them voting rights would cause endless conflicts between the different classes of security holders. Large numbers do not act together; doubtless they

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[28]The trouble today seems to be befuddlement in carrying through the underlying ethic to a definitive present-day expression of it. What seems to be so often overlooked is that the system of individual enterprise and private property must, and does, contain factors of stability as well as change.

"Now it is the beginning of wisdom to understand that social life is founded upon routine. Unless society is permeated, through and through, with routine, civilization vanishes. So many sociological doctrines, the products of acute intellects, are wrecked by obliviousness of this fundamental sociological truth. Society requires stability, foresight presupposes stability, and stability is the product of routine." Whitehead's introduction to Donham, Business Adrift (1931).

Here rise the shades of the old dualities, permanence and change, rule and discretion, law and equity. The stable factors in the system of individual enterprise and private property are comprehended in the security of property. Enterprise forgets the basis of its own successes. The place of security, especially of property, can be observed in the following: Fletcher v. Peck, 10 U. S. 87, 3 L. ed. 162 (1810); Beveridge, The Life of John Marshall (1916); Demogue, *op. cit. supra* note 27, at 418, § 237 *et seq.*

cannot.[29] Bonding is effective for employees but has not been adapted to those who control and manage. The practice could be extended by legal requirement. But bonds can be juggled and there is nothing in the bonding process, unless tied to rigid inspection, which guarantees that bonds will be taken or, if taken, will be adequate and collectible.

(2) *Civil Remedies*

The second method is cogent but has serious drawbacks. Cogency comes from the powers of chancery courts, and especially from the application of the rigid fiduciary requirements made effective through procedural rules on disclosure, non-disclosure, and burden of proof. One drawback consists in expensiveness. Most investors cannot retain counsel of requisite caliber nor engage in the onerous and lengthy contests. Nor are they any more able to unite and pool their resources than they are to come and act together in stockholders meetings. Experience with bondholders or investors committees does not inspire great optimism. Reliance, exclusively or mainly, on this method would result in stratification of savers into those who can afford long court battles to protect themselves and those who can not, the first of which will have legal protection and the second not. This result does not seem desirable.[30] Another drawback is that defaulters often are "judgment-proof." Success in the end means little; and taking unconscionable risks is encouraged. If the defaulter is lucky no suit will be brought against him and he will have gains for himself. If he is unlucky, he may have nothing *available* to satisfy a judgment and, consequently, may escape suit.

(3) *Administrative Regulation*

The third method, administrative regulation, has respectable achievements to its credit, but suffers handicaps and inadequacies.

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[29]Regarding the operation of this device, see the Armstrong Committee Report, *supra* note 15, and MARSHALL, INDUSTRIAL SOCIETY (1918) 715, on mutualization in life insurance companies; MARSHALL, *op. cit. supra*, at 716-39; BERLE AND MEANS, *op. cit. supra* note 7, bk. 1, cc. 4, 5, generally.

[30]This result is hazardous to the integrity of the property system. When property-holders become an isolated class set off by broad differences, the system is in peril. It is only the aspect of common opportunity and common right instead of special privilege, which the presence of large numbers of property-holders shading imperceptibly from the top to indistinguishable differences between the property-holders at the bottom and the propertyless can provide, that can enlist numbers or interests or moral convictions able to sustain the system. We hear a great deal about the solidarity of property interests. An attack on the mansion is an attack on the cottage, to use figurative language. It may be much more relevant that an unprotected cottage, continuing the figure, means an isolated and desolated mansion. However, there was once a famous pronouncement from an eminent source to the effect that it was good for the country when securities passed to stronger hands.

[31]BALLANTINE, CORPORATIONS (1927) 815-16.

Its application to types of business "affected with a public interest" is well established and valid.[31] In the case of banks, of building and loan associations, of insurance companies, there is chiefly internal regulation of the particular business units, although such regulation affects external relations. With carriers and other public utilities, the external feature seems to be dominant. In life insurance, a very creditable history begins just prior to the Civil War under Elizur Wright in Massachusetts, whose studies and activities as Commissioner there are the foundation of the whole development.[32] A great impetus to improvement on the pioneer achievement was given by the Armstrong Committee investigation in New York in 1906.[33] Probably the most scientific and honorable management to be found anywhere exists among life insurance companies. The record of strength which these companies have made under trying circumstances is the outstanding exhibit in the case for the corporation. And it must be remembered that this development was not initiated voluntarily but has come through pressure of public regulation, as the reports of Elizur Wright show[34] and the history following the Armstrong Report indicates. But the extension of these processes to corporations generally is much in doubt. Perhaps, most businesses are "different" from those of which regulation is most advanced and has proven most successful, particularly when internal regulation is considered. Attempts have been made by "blue-sky"[35] laws and the establishment of the Federal Trade Commission to make wide use of regulation mostly of the external sort. The most ambitious projects in this way are the recent Securities Act of 1933, the Securities Exchange Act of 1934, and the Public Utility Holding Company Act of 1935. The constitutional validity of these latter measures remains to be determined and, as well, their practical results. Such regulation, although touching external dealings, will, as we shall see, influence internal management profoundly, if the acts are put into consistent operation. No one seems to deny the desirability of the objectives, but there is great confusion and controversy in regard to the validity and usefulness of the means.

The case for regulation must rest upon speed and flexibility in application and upon the introduction of a complainant, public authority strong enough to command respect. There is no necessity of waiting until a multitude of abuses has produced a hopeless situ-

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[32] THE BIBLE OF LIFE INSURANCE, *supra* note 15.

[33] *Supra* note 15.

[34] THE BIBLE OF LIFE INSURANCE, *supra* note 15, at 69, 72, 87-109, 130, 131, 166, 199, *passim*.

[35] BALLANTINE, CORPORATIONS (1927) 832-38. Constitutionality of state "blue sky" laws sustained: Hall v. Geiger-Jones Co., 242 U. S. 539, 37 Sup. Ct. 217, 61 L. ed. 480, L. R. A. 1917F 514, Ann. Cas. 1917C 643 (1917).

ation. Transactions can be taken in their inception or discovered shortly after they occur by frequent inspection. Remedial measures can be adjusted to instant needs.

The handicaps under which regulation labors may, if we are not too insistent on meticulous terminology, be called psychological. New patterns of thought must be achieved and accepted. The work of Elizur Wright is the most instructive example. And unaccustomed analyses which disturb repose of mind are apt to be hated at sight, according to Justice Holmes. If all transactions are to be passed on in advance, administration of business is by government agents rather than by the officers of the corporations, an arrangement awkward, impossible, and provocative of hostile emotion. When transactions are to be passed on after they take place, there is a system of speedier and more flexible remedies but only after the harm is done, and the first bloom on the charm of prevention fades.

Inadequacies of regulation are revealed by the fact that examination is not always vigorous or honest. It may be neglected. It may be superficial. Examiners have been known to be corrupt.[36] The abuses are not caught in time and resort must be had to other forms of redress than those afforded by regulative practices. Even when inspection is prompt and searching, the directions of officials are not always complied with. It has occurred that the officers of the supposed-to-be regulated corporations "paid no attention to the provisions of the law, pleaded against further regulation, snubbed the supervising officials and threatened to sue" [the supervising officials if action should be taken].[37] Some further sanction is necessary. Regulatory measures make provision for such eventualities with criminal penalties for violations. It is arresting to note that probably the most instructive and influential report ever made on regulation, the Armstrong Report,[38] expressly advocates adding criminal penalties to regulatory provisions. The report of the Commissioner of Banks for Massachusetts after the trust company failures in Boston in 1920[39] recommends severe punishment as a necessity if regulation is not to be disregarded. The place and function of criminal sanctions in conjunction with the regulative scheme does not seem, however, to be any too clearly apprehended, but rather to have been slighted and despised. The interrelations of the ideologies of administrative regulation with the concepts of property and of the criminal law have not been clarified.

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[36] People v. Warder, *supra* note 13.
[37] BREMER, AMERICAN BANK FAILURES, *supra* note 13, at 107.
[38] *Supra* note 15.
[39] *Supra* note 16.

(4) *Criminal Sanctions*

The criminal law backs up the other methods with a strong moving party and with sanctions which reach and affect powerfully persons who otherwise might be indifferent or contemptuous. In addition it marshalls moral sense.

> "Certain fundamental principles of morality should be publicly and notoriously characterized by the civil community as inviolable by attaching to actions which are contrary to these principles an impressive mark of disapprobation. This mark also necessarily affects the author of the action, since a deed and its author cannot be contemplated separately. This is simply a result of the fact that the civil community is obliged to give practical recognition to fundamental maxims of morality."[40]

This the criminal law does by bringing dramatically into the picture public authority, whereas the other methods often leave the impression of a private squabble in which no preëminent public concern is plainly disclosed.

Besides invoking moral sense in general support of the interests sought to be protected, the criminal law technique, through requirements of accuracy of statement and conclusiveness of proof, aids in giving moral sentiment settled and definite form. The facts in such cases are apt to be involved, strange, and complicated with puzzling figures and mysterious terms and analyses. Criminal prosecution necessitates subsumption of all these intricate masses under broad and simple principles which can be apprehended in the terms of habitual modes of thought and action. In the favorite figure of a well-known teacher of equity, the world is composed of black and white and grays. Clear perception of black helps perspicacity in dealing with the grays; and likewise may stiffen the backbones of workers there as well as compel a heightened respect for their efforts and purposes.

However great the potentialities of moral sense may be, however indispensable its support is, the law cannot perform its tasks through generalized appeals, sound and fury, and sentimentalism. Clear concepts must be achieved. The law of embezzlement serves this need. When relations arise in which something in the nature of property is entrusted by one person to another, the type of criminal violation of that confidence is embezzlement; other such criminal breaches are but varieties of or incidents to embezzlement. The term "embezzlement" has the power of moral connotations. It

[40] Von Bar, A History of Continental Criminal Law (Continental Legal History Series, 1916) 513.

has also a sufficient history for the judicial process to have given it ascertainable meaning. These qualities are not possessed by the newer statutory language. From the cases in the books the judicially established concepts of criminal breach of trust as evolved in the law of embezzlement can be gathered. These concepts should be laid alongside persistent forms of corporate mismanagement, such as loans to officers and directors and to enterprises in which they are interested, speculative and other contracts in which those who control and manage have a personal interest, over-accumulation of surplus and over-payment of dividends, juggling benefits from one class of investor to another class, loading salaries and stubbornness and egotism in pursuing erroneous policies after error is clear.[41] Such a study could not sidestep the complexities of absolute and relative theories of justice;[42] mistake, poor judgment optimism, carelessness, and incompetence, as opposed to intent to defraud; or claims to an "unlimited privilege of mystery" and attendant difficulties of proof. The guide would have to be the concepts elaborated by the process of judicial inclusion and exclusion. And it ought not to be forgotten that too long has the criminal law been regarded as a despicable thing having to do only with nasty wrongs rather than as the ultimate defender of property.[43]

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[41]That these are persistent forms of abuse can be seen from any of the works and cases listed in notes 12, 13, 14, 15, 16, 17, *supra*. See, also, 2 McKinsey, Business Management-Finance (1922) 526-33.

[42]Von Bar, *op. cit. supra* note 40, at 498.

[43]See Sentell v. New Orleans & Carrollton R. R., 166 U. S. 698, 701, 17 Sup. Ct. 693, 41 L. ed. 1169 (1897).

NEGOTIABILITY OF PROMISSORY NOTES PAYABLE IN SPECIFICS

*Maurice S. Culp**

I

Under the law merchant a negotiable instrument had to contain an unconditional promise or order by the maker or drawer to pay a sum certain in money.[1] However, a number of states,[2] perhaps because of a primitive financial system or for other reasons connected with their local economy, passed statutes bestowing certain negotiable qualities to instruments in writing which promised or demanded payment of property, other articles of value, or services. The statutes adopted in Iowa,[3] Georgia,[4] and Illinois,[5] either

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[1]It is assumed for purposes of discussion that a note payable in specific articles of value is not payable in "money." A discussion of the meaning of the term "money" as used in referring to the medium of payment of negotiable instruments is beyond the scope of this paper.

[2]We know that statutes relating to such instruments existed in Georgia, Illinois, Indiana, Iowa, Mississippi, and Missouri. There are decisions in these states relating to the local statutes. There have been many similar statutes in other states which remain undisclosed through reported decisions.

It was equally clear that, in the absence of statute, instruments payable in property or other things of value were not negotiable. See Parker v. Baldwin, 216 Mich. 472, 185 N. W. 746 (1921) (instrument giving payor option to deliver a sum of money or so many bushels of potatoes); Hodges v. Clinton, 1 N. C. 79 (1792); Hyland v. Blodgett, 6 Ore. 166 (1881) (bill of exchange in form payable in lumber); Lawrence v. Dougherty & Gwin, 5 Yerg. 435 (Tenn. 1829); Kirkpatrick v. McCullough, 3 Humph. 171, 39 Am. Dec. 158 (Tenn. 1842); Fletcher v. Blodgett, 16 Vt. 26, 42 Am. Dec. 487 (1844).

[3]IOWA CODE (1873) § 2085: "Instruments by which the maker promises to pay a sum of money in property or labor, or acknowledges property or labor or money to be due to another, are negotiable instruments with all incidents of negotiability, whenever it is manifest from their terms that such was the intent of the maker; but the use of the technical words 'order' or 'bearer' will not manifest such intent." Sections 2084 and 2086 related to assignability, etc. Section 2085 appeared in the Code of 1851, c. 58, as § 950. In the Code of 1935, c. 422, §§ 9451 and 9452 are the counterparts of §§ 2084 and 2086 of the Code of 1873. The Code of 1935 carries no counterpart of § 2085 of the Code of 1873, quoted above.

In Council Bluffs Iron Works v. Cuppey, 41 Iowa 104 (1875), the Supreme Court of Iowa held such an instrument negotiable. For Iowa cases under this statute which holds notes non-negotiable, see Peddicord & Wyman v. Whittam *et al.*, 9 Iowa 471 (1859); McCartney v. Adm'rs of Smalley, 11 Iowa 85 (1860). Both cases depend on a failure clearly to manifest on the face of the note an intent to make it negotiable, holding that the use of the words "order" or "bearer" alone did not manifest such intention.

[4]The Georgia statute, first adopted in 1799, reads as follows: "All bonds, and other specialties, and promissory notes, and other liquidated demands, bearing date since the 9th of June, 1791, whether for money, or thing, shall be of equal dignity, and be negotiable by endorsement, in such manner and under such restrictions as are prescribed in the case of promissory notes. Provided, that nothing herein contained shall prevent the party giving any bond, note, or other writing, from restraining the negotiability thereof, by expressing in the body thereof such intention." GA. DIG. STAT. (Prince, 1822)

expressly or as interpreted by the courts, conferred on such instruments negotiable qualities very similar to those possessed by negotiable instruments payable in money. Those adopted in Indiana,[6] Missouri,[7] and Mississippi,[8] did little more than make such instru-

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24; GA. DIG. STAT. (Cobb, 1851) 519.

Under this statute, a note which gave the maker the option of payment in money or release of the payee from an indorser's liability on another note was held to be a negotiable instrument. Pool v. McCrary *et al.*, 1 Ga. 319, 44 Am. Dec. 655 (1846). In so far as this statute had retroactive effect, it seems to result in the impairment of the obligation of contracts.

[5]The Illinois statute first appeared in Ill. Laws 1819, p. 3. As it appeared in ILL. REV. STAT. (1845) c. 73, § 3, p. 384, it provided, among other things, "that all promissory notes, bonds, due bills, and other instruments in writing . . . . whereby such person or persons promise or agree to pay any sum of money in personal property, or acknowledge any sum of money or article of personal property to be due to any other person or persons, shall be taken to be due and payable; and the sum of money or article of personal property therein mentioned, shall, by virtue thereof, be due and payable to the person or persons to whom the said note, bond, bills or other instrument in writing is made." Other sections gave such instrument assignable qualities and authorized the assignee to sue in his own name. An instrument payable in lumber was held negotiable under this statute in Bilderback v. Burlingame, 27 Ill. 337 (1862).

In ILL. REV. STAT. (1874) p. 718, §§ 1 and 2 were the same in substance as §§ 3 and 4 of the 1845 compilation quoted *supra*, with a few minor changes. As the statute appears in the latest compilation it is in practically the same form. ILL. STAT. (State Bar, 1935) c. 98, §§ 1, 2. It should be noted, however, that § 219 of c. 98 repeals §§ 1 and 2 of the same chapter. This repeal appears to apply to §§ 1 and 2 of the Act of 1874 (contained in Revised Statutes of 1874, *supra*), and thus apparently removes the entire law regarding negotiability of these instruments.

[6]The Indiana statute in substance provided that the instrument might be negotiated by indorsement but that the indorsee should take subject to equities which the maker, before notice of the assignment, had against an assignor or against the original payee. This law seems to appear first in the Acts of 1818, p. 232. It was carried through the Revised Statutes of Indiana for 1843, 1852 and 1881. See IND. REV. STAT. (1852) c. 77, §§ 1-3. Although the statute still appears in the latest unofficial Indiana compilation [IND. STAT. ANN. (Burns, 1933) § 19-1901 *ff.*] it must have been superseded insofar as there is conflict with the uniform law.

[7]The earliest Missouri statute dealing with instruments payable in money or property appears in the Revision of 1825, in the chapter dealing with assignments. Sections 1 and 2 of this statute permitted the assignment of such instruments, but provided that the defendant could have his defenses against the assignee and in addition all set-offs and discounts unless the instrument expressly stated that it should be paid without defalcation or discount. Substantially the same provisions appear in MO. REV. STAT. (1845) c. 21, §§ 1-5 and MO. REV. STAT. (1856) c. 21, §§ 1-6.

A change appears in MO. GEN. STAT. (1866) c. 87, § 6. Here instruments in writing to pay a sum of money or property are declared to import a consideration. Nothing is said about defenses, but in c. 86 of the same compilation, dealing with bills of exchange and negotiable promissory notes, § 15 states that promissory notes calling for the payment of money are negotiable in like manner as inland bills of exchange. Section 6 appears later as MO. REV. STAT. (1873) § 663 and is incorporated in almost identical words at the present time. MO. REV. STAT. (1929) § 2958. For application of the statute, see Spears v. Bond, 79 Mo. 457 (1883).

[8]Rankin v. Sanders, 6 How. 52 (Miss. 1841). The statute appears in MISS. REV. CODE (1824) c. 106, § 9. It provided that writings for the payment of

ments freely assignable and create a presumption of consideration,[9] similar to that which any negotiable instrument payable in money imported. In Mississippi, the early statute continued in substance as the law governing all so-called negotiable instruments whether payable in money or other things until the adoption of the uniform law in 1916. Its effect was to permit defenses to any instrument, whether in the hands of a *bona fide* holder or not, and thus deprive Mississippi of any truly negotiable instrument free from equities in the hands of a holder in due course.[10]

The Negotiable Instruments Law has been adopted in all states since the enactment of these early statutes. The object of the uniform law was to remove the differences which existed between the several states in decisions and statutes governing negotiable paper. An instrument payable in property or in services is certainly speculative in value and surrounded with uncertainty. Although there is no apparent vocal expression of the idea, one of the objects of the uniform law must have been the removal of just such instruments as these here considered from the classification of negotiable paper. Section I of the uniform act states that the instrument "must contain an unconditional promise or order to pay a sum certain in money." In the presence of such positive phraseology, and in view of the uniformity sought to be obtained, it would seem

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money or any other thing might be assigned by indorsement but that they were subject to defenses of the maker or other person sued.

[9]This presumption applied in the case of an assignee as a matter of pleading in a few states. See Raher v. Schreibler, 15 Mo. 602 (1852); Fink v. Maples, 15 Ind. 297 (1860).

[10]The original statute, seems to have been an act of June 25, 1822, §§ 4 and 12, which together provided that cotton receipts, bonds, promissory notes, and other writings for the payment of money or any other things should be assigned by indorsement whether payable to order or not; that the assignee could sue in his own name; and that the defendant in all actions should be allowed the benefit of want of lawful consideration, failure of consideration, payments, discounts, and set-offs, made, etc., previous to notice of the assignment. Section 12 permitted suit by the assignee against his indorser or assignor as in the case of inland bills of exchange. Section 12 of the Act of 1822 was carried in substantially the same form until the adoption of the negotiable instruments law, when the statute was changed to apply to promissory notes not payable to order or bearer. It appears in this form in MISS. CODE ANN. (1930) § 2853, and still applies to all non-negotiable notes made in Mississippi.

It is readily apparent, from the terms of § 12 of the act of 1822, that no promissory note or other instrument calling for the payment of money, even though in form negotiable under the law merchant, could be a negotiable instrument in the sense of the law merchant. Any inconsistency with the negotiable instruments and § 2853 of the Code of 1930 is averted by the phraseology of § 2853, which excepts notes or writings payable to order or bearer from its operation. In other words, it no longer applies to negotiable instruments. By the same token, under the uniform law as adopted in Mississippi, a negotiable instrument must not only be either an order or bearer instrument but also must contain an unconditional order or promise to pay a sum certain in money. That effectively eliminates from the negotiable field any instrument payable in "other things" or "in specifics."

that any of these statutes which still exist in any state have been repealed by implication,[11] at least. Such statutes could with certainty be given recognition today only in the event of their affirmation by the uniform law or by a modification of the uniform law giving specific validity to instruments payable in specifics.[12]

Indeed, the Negotiable Instruments Law as adopted in Illinois tacitly recognized the old statute in one place[13] only to discard it elsewhere, and in Georgia the legislature made express mention of the note payable in specifics in the body of the uniform law. The Georgia statute represents the only express variation in Section 1 (2) of the uniform law to be found in any state. Like some of the earlier statutes, the Georgia statute is now operative only upon promissory notes. The bill of exchange and, of course, the check are governed by the requirements of the uniform law embodied in Section 1 (2) as adopted in every other state.[14]

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[11]See BRANNAN, NEGOTIABLE INSTRUMENTS LAW (5th ed. 1932) 82, 1104-1105; Eaton, *On Uniformity in Judicial Decision of Cases arising under the Uniform Negotiable Instrument Act* (1913) 12 MICH. L. REV. 89, 91 *ff.*

[12]Even without express statutory exception or retention it might be argued that these statutes are still in force. There is an analogy to be drawn from the laws which declare that certain conduct, e.g., usury, constitutes an absolute defense to actions upon contract. Despite the apparently exclusive enumeration of defenses in the Uniform Law, §§ 55-59, these statutes are applied, even as against a holder in due course, by some courts. This has been true under the gaming laws. Plank v. Swift, 187 Iowa 293, 174 N. W. 236 (1919); Levy v. Doerhoefer, 188 Ky. 413, 22 S. W. 515, 11 A. L. R. 207 (1920). *Cf.* Wirt v. Stubblefield, 17 App. D. C. 283 (1900). Also, under usury laws. Sabine v. Paine, 223 N. Y. 401, 119 N. E. 849 (1918).

Such laws have been applied to negotiable instruments on the theory that they represent a public policy which is presumed to continue, unless repealed expressly or through implication by the uniform law. Sabine v. Paine, *supra.* See BIGELOW, BILLS, NOTES AND CHECKS (3rd ed.) 429-432.

However, no considerable support favorable to negotiability of notes payable in specifics may be drawn from these cases for at least two reasons: (1) unlike statutes which declare certain kinds of contracts void from their inception, the commodity-note statute does not represent a very strong public policy; (2) while the above mentioned class of cases is expressly based upon the absence of an express or implied repeal, the statutes discussed in this paper are impliedly affected by the strong language of the uniform law that a negotiable instrument "must contain an unconditional promise or order to pay a sum certain in money."

[13]The Illinois uniform law in its enacting clause uses the words "An instrument payable in money" instead of the phraseology of § I of the uniform law. ILL. STAT. (State Bar, 1935) c. 98, § 21. This phraseology would seem to except from repeal so much of the earlier act as applies to instruments payable in things other than money, and the old statute is carried in the latest compilation. ILL. STAT. (State Bar, 1935) c. 98, §§ 1-5. But note that c. 98, § 219 repeals the act of March 18, 1874, which seems to be the foundation of §§ 1 and 2 of c. 98. See discussion in note 4, *supra.*

[14]The statutes of Georgia never attempted to affect any other instrument than the promissory note. Very early in Georgia history it was decided that an instrument in the form of a bill of exchange but payable in lumber, was not in fact a negotiable instrument. Smith v. Barnes, 24 Ga. 442 (1858).

The Georgia statute varies from Section 1 (2) of the uniform law as follows:[15]

> "It must contain an unconditional promise or order to pay a sum certain in money, provided that a promissory note may be made payable in cotton or other articles of value."

Section 184 of the uniform law in Georgia is rephrased thus:[16]

> "A negotiable promissory note within the meaning of this Title is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money or in cotton or other articles of value to order or bearer . . . ."

As before mentioned, negotiable qualities were bestowed upon notes payable in specifics by the Georgia legislature in 1799.[17] By the act of 1800 the legislature took the second step, made necessary by the act of 1799, and provided a method of measuring or calculating the price of specifics.[18] The present act fixes the measure of damages for failure to perform according to the terms of the note as the value of the specifics at the time the note became due.[19] But if the debtor pays at maturity, in the absence of a contract modifying the presumption created by the statute, he has the option of paying either in specifics or in the money equivalent of the specifics on that day and at the place of payment.[20]

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[15]GA. CODE (1933) § 14-201 (2).

[16]GA. CODE (1933) § 14-1701. The remainder of this section retains the long established rule for valuation of such contracts, fixing in terms of money the damages for a failure to perform the promise to deliver specifics at maturity.

[17]See note 3, *supra*.

[18]Ga. Dig. Laws (Prince, 1837) § 813. The "whereas" clause of this statute indicates that the legislature was passing the act in recognition of the frequent use of the contract payable in specifics at that time in Georgia history.

[19]GA. CODE (1933) § 14-1701. " . . . If it is made payable in articles of value other than money, and payment is not punctually made, the holder may recover the value of such articles at the time the note was due, at the place where it was payable, if a specific place is mentioned, otherwise at the place where it was made, with lawful interest thereon."

The history of this section, as before mentioned, is very long. Its present form is not that of the original, but in principle the same statute may be traced from Acts of 1799 (see note 3, *supra*) through § 2723 of the Code of 1861, § 2732 of the Code of 1867, § 2774 of the Code of 1873, § 2774 of the Code of 1882, § 3677 of the Code of 1895, § 4270 of the Code of 1910, to § 14-1701 of the Code of 1933.

[20]GA. CODE (1933, § 14-1702. "All agreements to pay in specifics are presumed to be made in favor of the debtor who pays in specifics, or in lieu thereof he may pay the amount of the debt in money determined by the values to be fixed as in the preceding section." The latter reference is to § 14-1701. The rule embodied in this statute first appears as a decision of the Supreme

One of the earliest Georgia decisions involved an instrument containing an option in the maker to pay a sum of money or to release the payee from an indorsement on a separate note. The Supreme Court of Georgia recognized that this was not a negotiable instrument according to the Statute of Anne but held that it was negotiable under the Georgia act of 1799.[21] Such a note is admissible in evidence on the same terms as a promissory note payable in money.[22] Under the early Georgia pleading rules, permitting the pleading of a cause of action on a negotiable instrument by a short form, notes payable in specifics were put in that class.[23] The Illinois experience with a statute similar to the Georgia law was parallel with that of Georgia in judicial decisions on both substantive law and in procedure.[24]

Court in Sims v. Cox, 40 Ga. 80. It was embodied in § 3678 of the Code of 1895, § 4271 of the Code of 1910, and finally in the present Code of 1933, § 14-1702. The option given by this section may be waived or varied by contract. The statute merely creates a presumption.

[21]Poole v. McCrary, 1 Ga. 319, 44 Am. Dec. 655 (1846). Defendant McCrary executed to Poole an instrument promising to pay a sum certain on a certain day. Subjoined to the instrument was a memorandum reciting that defendant might discharge it by releasing plaintiff's indorsement on another note. Plaintiff sued on this instrument as a promissory note, alleging that his indorsement had not been released. The court held it proper to declare upon the instrument as a negotiable note.

[22]Hart v. Conner & Taylor, 21 Ga. 384 (1857). The instrument admitted in evidence read as follows: "Received from Connor and Taylor, of Macon, $500 as an advance on sundry bales of cotton, to be delivered in their warehouse within 30 days. [Dated and signed.]"

[23]The declaration alleged that the defendant was indebted to plaintiff in the sum of $500, with interest on a note dated on Nov. 28, 1873, due Jan. 15, 1874, which the defendant refused to pay. The note was as follows: "On or before the 15th day of January next, I promise to deliver to Eleazor Taylor or bearer, five bales of lint cotton of medium value, each weighing 500 pounds, at Buena Vista, Marion County, Georgia, for the purchase of lots of land numbered 135 and 148 in fourth district of Marion county. 28 day of Nov. 1873. Rogers." The Bank of Americus v. Rogers, 55 Ga. 29 (1875).

[24]The Supreme Court of Illinois gave an exceedingly broad construction to a contract, holding it to have the statutory essentials requisite to negotiability, in Stewart v. Smith, 28 Ill. 397 (1862). The contract follows: "Chicago. 21, January, 1859. Received from teams in our pork house, No. 114 W. Harrison Street, 280 hogs, weighing 45,545 pounds, the produce of which we promise to deliver to order of Messers. Stevens & Brother indorsed hereon. G. & J. Stewart." One judge dissented. He could not interpret the writing as a receipt for pork. It was, he said, an instrument calling for the payment of the product of an article of personal property and hence not within the statute, and not a promissory note or a negotiable instrument.

In Bilderback v. Burlingame, 27 Ill. 337 (1862), a leading Illinois case disapproving earlier conflicting cases, the court held that an instrument promising to pay "Four-hundred and fifty dollars, to be paid in lumber when called for, in good lumber, at one dollar and twenty-five cents," was admissible in evidence under the common counts without proof of consideration. The plaintiff in this action secured the instrument after it had been presented for payment and with apparent notice, but the case raises no question relative to a defense on the basis of original equities against the payee; it simply settles a question of pleading. *Cf.* Archer v. Claflin, 31 Ill. 306 (1863).

However, in declaring upon a note payable in specifics, the Georgia pleader had to allege the value of the specifics at the maturity date. After breach of the obligation to pay in property the plaintiff's cause of action became an assumpsit, raised by the law, to pay so much money as the property was worth when the notes fell due.[25] The Supreme Court of Illinois[26] viewed the contract to pay in specifics as a money demand only after the maturity date of the note.[27] And the Mississippi court held that a note payable in cotton became an absolute money demand after maturity.[28]

By the statute previously cited,[29] in Georgia the maker of a note payable in specifics presumptively has the option of paying either in the commodity or a sum of money the equivalent in value

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[25]Phillips v. Dodge, 8 Ga. 51 (1850). A declaration upon a note payable in hogs was bad without an averment of the value of the hogs at the date of maturity.

[26]Vanhooser v. Logan, 3 Scam. 389, 38 Am. Dec. 90 (Ill. 1842). The note was for $300.50, payable in cattle at a day certain. After the expiration of the day, the court held that it was a money demand, and that the clerk of court properly assessed the damages upon judgment for the plaintiff rendered on demurrer.

[27]Two Georgia cases applying this measure of value illustrate the operation of the rule. Newton Mfg. Co. v. White, 47 Ga. 400, 404 (1872); Clark v. Minor, 73 Ga. 590 (1884). In Clark v. Minor the note agreed to pay 62,500 pounds of ginned cotton. Defendant made several payments in cotton, but less than the full amount. In an action upon the note, he claimed that he was entitled to a credit of the value of the cotton delivered, but the court held that the payee could sue for the value of the cotton not delivered at the time and place where it should have been delivered, with interest. The payee could waive the breach with respect to the cotton already delivered, and then sue for the value of the cotton remaining undelivered.

If a mortgage is given to secure a note payable in specifics, the measure of damages on foreclosure will be the value of the specifics which should have been delivered. Hatcher v. Chancey, 71 Ga. 689 (1883). In Bell v. Ober & Sons Co., 96 Ga. 214 (1895), this statutory rule was applied in awarding damages for the conversion of certain notes payable in commodities which had been given as security for purchases of fertilizer.

[28]Hardeman v. Cowan, 10 Sm. & M. 486 (Miss. 1848). In Gordon v. Parkers, 2 Sm. & M. 485 (Miss. 1844), the court holds that the measure of damages for failure to pay where no contract rate is set in the agreement, is the value of the specifics at the due date.

Cf. Noonan v. Isley, 17 Wis. 423 (1863) (not a negotiable instruments case), wherein the promise involved was to pay $300 in Watertown railroad stock. The court held this was satisfied by payment of stock of the nominal value of $300 regardless of the actual value, on the theory that the general practice is to measure stock value in terms of its face value. *Quaere* as to the soundness of this theory today.

[29]See note 18, *supra*. This statute confirmed the previous decision of Sims v. Cox, 40 Ga. 76, 3 Am. Rep. 560 (1869). In Strout v. Joy, 108 Me. 267, 80 Atl. 830 (1911), the court construed an ordinary contract payable in money or an equivalent amount in specifics to permit the debtor to have the option of a mode of payment. If there is, however, an absolute agreement to accept specifics, the exact terms of the contract must be followed. Aikin v. Bloodgood, 12 Ala. 221 (1847); Richardson v. Sears, 74 Wash. 499, 133 Pac. 1010 (1913).

of the specifics at the date of payment.[30] This option renders the ultimate value of such a note decidedly uncertain, particularly if the promise has very long to run and the market price of this particular specific is fluctuating. The alternative to this unsatisfactory state of the law is a contract between the parties which alters the statutory presumption. At least three modifications can be suggested. One is equally favorable to debtor and creditor insofar as certainty of the sum to be paid is concerned. It would require a statement of the sum to be paid in terms of money, except that the maker would have the option to pay in specifics whose market value on the date of maturity equalled the sum of money to be paid. Another alternative might require payment of the note in specifics on the basis of a certain fixed money value per unit of commodity, that is, the debtor could pay his debt in cotton, for example, at 10 cents per pound regardless of the market price;[31] in such case the debtor

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[30]There is abundant authority from other states on a general principle of contract law that a failure to exercise the option at or before the due date converts the claim into a money demand. These cases merely involved contracts which gave the payor an option, and were not based upon negotiable instruments in most cases. Vanhooser *et al.* v. Logan, 3 Scam. 389, 38 Am. Dec. 90 (Ill. 1842); McKinnie v. Lane, 230 Ill. 544, 82 N. W. 878 (1908); Nipp v. Diskey, 81 Ind. 214 (1881); Schnier v. Fay, 12 Kan. 184 (1873); Cameron v. Orleans & J. Ry. Co., Ltd., 108 La. 83, 32 So. 208 (1902); Irving v. Bond *et. al.*, 76 Neb. 293, 107 N. W. 585 (1906); Trowbridge v. Holcomb *et al.*, 4 Ohio St. Rep. 38 (1854); Lawrence v. Dougherty & Gwin, 13 Tenn. 435 (1829); Stone v. Stone, 43 Vt. 180 (1870).

In an interesting note to the case of Roberts v. Beatty, 2 Pen. & W. 63 (Pa. 1930), entitled, "Notes Payable in Specific Articles," 21 Am. Dec. 422 (1886), the editor discusses the law relative to notes payable in specific articles of personal property. Many cases in this group concern contracts which could not be termed negotiable instruments. These notes are divided into three types, depending on whether the promisor agrees (1) to pay a certain sum in money in specific articles at a fixed rate, (2) to pay a certain sum in specifics without specifying a rate, or (3) to pay a certain sum or to furnish certain specifics. Under class (1) the authorities were divided on the question whether such contracts were for the mere delivery of personal property or whether they gave an option to deliver in property or to deliver its value in money. In class (2) all authorities agreed that the promisor had the option, and in class (3), of course, the option was expressly given by contract. The general current of authority was that the option to pay in either way existed until the maturity date; afer that time the note was payable only in money.

[31]See Dooley v. Wilbanks, 25 Ga. App. 34, 37, 102 S. E. 364 (1920), where the court said: "Where it appears, however, from the agreement, that it was the intent of the parties thereto that the debt should be paid in specifics on the basis of a certain fixed money value thereof, irrespective of their market value at the date of the maturity of the obligation, then the debtor can at his option pay the money value of the specific articles called for on the basis fixed in the agreement." In this case the contract agreement was to purchase farm land, the vendor agreeing to sell the land at $17 per acre or for 180 five hundred pound bales of cotton, to be paid at the rate of fifteen bales per year over an eleven year period. There was a provision that if the maker did not raise the cotton on the farm, he could pay cash on the basis of ten cents per pound. Plaintiff sued on three overdue notes and asked damages at the rate of thirty cents per pound. The court held that the agreement was designed to fix an arbitrary price of ten cents per pound regardless of the prevailing

could pay in specifics or in money the value of the specifics as set by the terms of the note.[32] This solution, however, reaches only an apparent certainty. If the maker elects to pay in specifics, particularly if their actual value is less than the stipulated price per unit in the contract, the instrument's actual worth to the payee or holder is speculative. This type of an agreement would be advantageous to the debtor in many instances. Under the third alternative, an agreement, both advantageous to the creditor and negotiable under the law of any of the states,[33] might specify a definite sum in money to be paid by the maker, leaving an option with the holder to demand payment in specifics at a certain rate or in a certain quantity if that proved desirable.

What is the liability of an indorser upon a note payable in specifics? According to the Georgia statutes and court decisions, a note, having all of the other formal requisites, payable in anything of value is a negotiable instrument. There is no intimation from the statute that the framers intended the liability of a secondary party on such a note to be any different from the liability of a secondary party upon other negotiable instruments. The provisions of Section 66 of the uniform act would apply, in the absence of a different construction, to such an indorser.[34] It would follow that the measure of liability on the part of an indorser would be, under ordinary circumstances, for a sum of money equivalent to the value of the specifics promised at the date delivery should have been made. The indorsers, in the absence of a special provision in the note for measuring value which would govern his liability, would have no option to furnish the specifics because his promise is to pay, according to the tenor of the instrument if it is dishonored; but by the terms of the Georgia statute the default of the maker converts the obligation into a money claim.[35] Presumably this rule also applies to the indorser, although there are no decisions on the point.

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market price and that such was the measure of damages. See Whitsett v. Forehand, 79 N. C. 230 (1878), for a like construction of notes with similar provisions. Accord in principle: Mobley v. Tufts, 36 Ga. App. 764, 183 S. E. 272 (1927).

[32]Dunn v. Ligon, 152 Ga. 497, 110 S. E. 280 (1921).

[33]NEGOTIABLE INSTRUMENTS LAW § 5 (4).

[34]Cochran v. Strong, 44 Ga. 636 (1872) is apparently the only Georgia case involving the liability of an assignee of a note payable in specifics as an indorser. The note in question, however, lacked other essential characteristics of a negotiable instrument, and consequently the court decided only that an indorser's liability did not attach to the assignee of a non-negotiable note payable in specifics.

[35]GA. CODE (1933) § 14-1701. Miss. Laws 1822, § 12 created a liability comparable to that on a bill of exchange.

Under the Illinois statute, which is separate from the uniform law, it may be doubted whether an indorser's liability attached to an assignee. ILL. REV. STAT. (1845) c. 73, § 4, p. 384: "Any such note, bond, bill or other instru-

The very nature of a note payable in specific articles of personal property is a *liability* from the viewpoint of a prospective purchaser either for investment or accommodation. Consequently, regardless of the legally flawless negotiable character of such notes under the law of Georgia, the expectancy of interstate transfer or sales of such instrument is indeed slight. Information derived from bankers and lawyers in states contiguous to Georgia confirms this supposition to be the actual fact. Transactions involving such notes payable in specifics are practically non-existent in regular interstate banking channels.[36]

But it is entirely possible that a banker in a neighboring state might take such an instrument as security, or that a farmer or merchant in a neighboring state might take such a note either from necessity or as an accommodation to the maker. In such an event, if action should be brought against the maker upon the note in a state other than Georgia, there would be a problem of conflict of laws. This issue would be sharply outlined because all other neighboring states do not regard local notes payable in specifics as negotiable instruments.[37]

Where contracts made in other states are not contrary to the public policy of the forum,[38] the courts of the forum are likely to

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ment in writing, made payable to any person or persons, shall be assignable, by endorsement thereon, under hand or hands of such person or persons, and of his, her or their assignee or assignees, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof, in each and every assignee or assignees successively." But see notes 4, 10, 11, *supra*, for a discussion of the probable repeal of this statute.

[36]Out-of-state bankers, questioned about notes payable in specifics, in some instances expressed surprise that a note payable in specifics is negotiable in Georgia, and all of them were of the opinion that such notes would not find their way across state lines in the course of regular banking business. One banker suggested that a bank might take such notes as collateral security from another bank or a customer-debtor who was involved in financial difficulties as a possible opportunity to protect itself from total loss.

[37]This fact is indicated by the off-hand opinion which an attorney practising in another state is likely to give regarding the negotiability of such a note in his state. He will say that of course such a note could not be sued upon in his state as upon a negotiable instrument. On second thought, however, he is likely to recognize that there is a conflict-of-laws problem in issue.

[38]It is possible that a state court might hold that its uniform law requiring that a note be payable in money represented a public policy against notes payable in specifics. However, there can be very little objection to a mere contract to deliver specifics, and hence it seems difficult to support an argument that a note payable in specifics would be unenforceable because it is negotiable by the law where it is made and payable. A mere difference in the law of two states is not sufficient ground to invoke the doctrine of public policy in the forum. Such a contract is neither against good morals, nor injurious to the citizens of other states and where not positively forbidden by legislation in the forum, there is no good reason for refusing to enforce such a note on grounds of public policy. See GOODRICH, CONFLICT OF LAWS, 215-217. If, however, there were an express statute denying validity and negotiability to such notes, a positive policy would seem sufficiently expressed to justify the court of the forum in denying an action upon a note payable in specifics.

apply orthodox rules of conflict of laws in construing them. Negotiable instruments are no exception. For example, in Georgia the prevailing type of note payable in specifics is a promise to deliver a certain number of bales or pounds of cotton, bushels of corn, or both, at a certain place specified, particularly if made out on a common legal form. If written out by the landlord or his tenant, it may contain only a promise to deliver specifics without mentioning the place of delivery. In either case the contract will usually be made in Georgia, and the delivery will be expressly required or at least tacitly assumed to be made in Georgia.

Where the negotiable instrument is made and is expressly payable in the same state, the authorities are agreed that the law of that state governs; the place of making and of performance coincide,[39] and there is no opportunity for a clash of theory regarding the law to apply. Thus a note made and payable in Georgia should be governed by the laws of Georgia. Since a note payable in specifics is a negotiable instrument under the law of Georgia, it should be treated as such an instrument in every other state.

Where a promissory note is made and is by its terms payable in the same state, there can be no doubt of the intention of the parties concerning the law intended to govern the validity of the note. Even where the promissory note is made within a state and nothing is said about the place of payment or performance, the courts generally hold that the note is governed by the law of the state where it is made.[40] Thus the rent note[41] made in Georgia with no definite place of payment specified, should be governed by the law of Georgia.

A promissory note made in one state providing for payment in another presents a different legal problem. This issue is pre-

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[39]Koney v. Hoffman *et al.*, 229 Fed. 486 (C. C. A. 8th, 1916) (note executed and made payable in Missouri); Smith v. Zabel *et al.*, 86 Ind. App. 310, 157 N. W. 551 (1927) (note dated in Illinois and payable at a bank in the same state); Six v. Mathews, 63 Mo. 371 (1876) (note made and to be paid in Indiana).

[40]Crume v. Brightwell, 69 Ind. App. 404, 122 N. E. 230 (1919) (note dated at Atlanta, Georgia, payable at Fourth National Bank, no place of payment specifically mentioned, held governed by the law of Georgia); Strawberry Point Bank v. Lee, 117 Mich. 122, 75 N. W. 444 (1898) (note dated in Michigan, payable to a resident of Iowa, but no place of payment specified, delivery presumed in Michigan and held governed by Michigan law); Dow v. Rowell, 12 N. H. 49 (1841) (note made in Vermont and all parties resident of Vermont, governed by Vermont law); Barrett v. Dodge, 16 R. I. 740, 19 Atl. 530 (1890) (note drawn and mailed in New York, no place of payment being specified, regarded as governed by laws of New York).

[41]Ordinarily a negotiable instrument is not completed until it is delivered. Consequently the place of delivery may be an important fact in determining what law governs the instrument. Watson v. Lane, 62 N. J. L. 550, 20 Atl. 894 (1890); Barrett v. Dodge, 16 R. I. 740, 19 Atl. 530 (1890). 2 BEALE, CONFLICT OF LAWS (1935) 1047.

sented, for example, by a note calling for the payment of two bales of cotton made in Georgia but requiring delivery in South Carolina. As contrasted with the two previous factual situations, there is a disagreement among the courts concerning the rule of conflict of laws applicable to such a situation involving simple contracts.[42] But the cases involving negotiable instruments, where the place of making and place of payment differ, hold that the law of the place of performance or payment governs. Courts declare that the law of performance governs either as matter of law[43] or because that seems to be the presumed intention of the parties.[44] South Carolina law would govern in our hypothetical case mentioned above.

Suppose a note payable in specifics is declared non-negotiable by the courts of the forum because a contrary holding would violate the public policy of the forum. What effect does the full faith and credit clause of the Federal Constitution have in such a case? Perhaps it is possible to make a plausible argument that the law of the place of making and payment bestows a negotiable quality upon the note; that a failure to recognize this attribute is a denial of the full faith and credit which is due to a statute of another state.[45] The precedents, however, do not go so far.

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[42]See 2 BEALE, CONFLICT OF LAWS (1935) 1044 *ff.*; GOODRICH, CONFLICT OF LAWS, 228 *ff.*

[43]United States National Bank v. Smith, 180 Cal. 1, 179 Pac. 160 (1919); McCornick & Co. v. Tolmie Bros., 46 Idaho 544, 269 Pac. 96 (1928); Midland Steel Co. v. Citizens' National Bank of Kokomo, 34 Ind. App. 107, 72 N. E. 290 (1904) (dated in Indiana and payable in Pennsylvania); Bombolaski *et al.* v. First National Bank, 55 Ind. App. 172, 101 N. E. 837 (1913); Gates v. Fauvre, 74 Ind. App. 382, 119 N. E. 155 (1918); Sykes v. Citizens' National Bank, 78 Kan. 688, 98 Pac. 206 (1908); Stevens v. Gregg *et al.*, 89 Ky. 461, 12 S. W. 775 (1890) (executed in Kentucky and payable in Ohio, governed by Ohio law); Barger v. Farnham, 130 Mich. 487, 90 N. W. 281 (1902) (note made in Michigan but payable in West Virginia); Emanuel & Barnett v. White, 34 Miss. 56 (1857) (payable in Louisiana and governed by that law); Lienkauf Banking Co. v. Haney, 93 Miss. 613, 46 So. 626 (1908) (dated in Mississippi and payable in Louisiana); Security Finance Co. v. Sharpe, 152 Miss. 286, 119 So. 829 (1929); Sioux National Bank v. Lunbery, 54 S. D. 581, 223 N. W. 826 (1929). See 2 BEALE, CONFLICT OF LAWS (1935) 1185-1187.

[44]Blackman Commercial & Savings Bank v. Ketcham, 36 Cal. App. 284, 171 Pac. 1084 (1918); McCornick & Co. v. Tolmie Bros., 46 Idaho 544, 269 Pac. 96 (1928); United Bank & Trust Co. v. McCulloch, 115 Neb. 327, 212 N. W. 762 (1927) (place of performance governs in absence of a clear intention otherwise). *Cf.* Security Trust & Savings Bank of Charles City, Iowa v. Gleichmann, 50 Okla. 441, 150 Pac. 908 (1915).

[45]This argument could be made only in the case of a note made and to be paid in Georgia. If the performance or place of payment were in another state, the argument that Georgia law and policy controlled would be less convincing, particularly if the other state had a positive statute on the very same point. As the Supreme Court, speaking of Converse v. Hamilton, 224 U. S. 243, 56 L. ed. 749, 32 S. Ct. 415 (1912), said in Broderick v. Rosner, 294 U. S. 629, 79 L. ed. 1100 (1935), "Wisconsin was required to enforce the Minnesota assessment because the statutes are 'public acts,' within the meaning of the clause. . . . Where a State has had jurisdiction of the subject matter and the parties, obligations validity imposed upon them by statute must, within

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The experience in Georgia with the note payable in articles of value is long and interesting.[46] As already noted, the first statute

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the limitations above stated, be given full faith and credit by all the other states." In Broderick v. Rosner, the Supreme Court seems to place emphasis on the point that the public policy of the forum could not be controlling where the contract was made in another state, and the bank incorporation, involved in the case, took place there.

Even where the contract is made and is to be performed in Georgia and all the parties at the time are residents of Georgia, there is no actual precedent for holding that the courts of the forum must give full faith and credit to the Georgia statute. To be sure, a good argument could be made that, under the recent tendency of the Court to balance interests, the interests of Georgia in such a situation are so far superior to those of the forum that the policy of the forum can have no application. Such an argument might be built up from Bradford Electric Light Co. v. Clapper, 286 U. S. 145 (1932) and Broderick v. Rosner, 294 U. S. 629 (1935). However, the limiting effect of the decision in Alaska Packers Association v. Industrial Accident Commission, 294 U. S. 532, 79 L. ed. 104 (1935), should not be forgotten.

Over against the application of constitutional compulsion to statutes governing ordinary contracts, of which negotiable instruments would be a branch, is the lack of authorities. Precedents seem confined to statutes governing receiverships [Converse v. Hamilton, 224 U. S. 243, 56 L. ed. 749 (1912)], stockholder's liability [Broderick v. Rosner, 294 U. S. 629 (1935)], fraternal insurance contracts [Modern Woodmen of America v. Mixer, 267 U. S. 655 (1925)], and workmen's compensation (Bradford and Alaska Packers Association cases, *supra*). One writer suggests that the Supreme Court is not likely to broaden the scope of the constitutional provision to cover statutes applying to ordinary contracts. See Comment (1935) 45 YALE L. J. 339.

On the other hand, the appeal to the full faith and credit clause in support of interstate recognition of statutes has been infrequent, and want of precedent, never an intrinsic reason by itself, is not an insuperable obstacle to a broad interpretation of the constitutional provision. The language of Art. IV, § 1 would permit a much broader application than heretofore given, and perhaps Congress may eventually be induced to clarify the situation by a statute prescribing the "effect" to be given to the public acts of the several states. In the recent Supreme Court decision of John Hancock Mutual Life Ins. Co. v. Yates, 57 Sup. Ct. 129 (1936), the court required the Georgia Supreme Court to give full credit to the New York statute which governed the contract made and to be performed in New York. To be sure it was an insurance contract and an insurance statute was involved, but the Supreme Court did not consider that fact significant. The significant thing was that a statute existed which must be recognized. In the language of the court: "Because the statute is a 'public act,' faith and credit must be given to its provisions as fully as if the materiality of this specific representation in the application, and the consequent nonexistence of liability, had been declared by a judgment of a New York court." See Cook, *The Powers of Congress under the Full Faith and Credit Clause* (1919) 28 YALE L. J. 421. For other discussions of the full faith and credit to be accorded legislative acts see Langmaid, *The Full Faith and Credit Required for Public Acts* (1929) 24 ILL. L. REV. 383; Ross, *Full Faith and Credit in a Federal System* (1936) 20 MINN. L. REV. 140.

[46]The facts and data for this part of the paper are derived from correspondence, or an occasional interview, with bankers, lawyers and farmers and persons acquainted with farming practices in Georgia and neighboring states. Conclusions are stated without citation of authority, but all assertions are based on facts or inferences drawn from letters and notes of interviews. It is impossible to indicate names of persons who have contributed information, but acknowledgement of the very material assistance given by Hon. H. F. Lawson, Hawkinsville, Georgia, cannot be omitted.

making such notes negotiable was adopted in 1799. No doubt, at that time business men as well as farmers had need of instruments payable in specifics. For many years, particularly before the advent of the boll weevil, which severely curtailed cotton production, the standard farm rent had been paid in cotton. The rent was based upon so many bales of cotton to the "plow," that is, using a one-horse farm as a basis for computation. The rent note payable in cotton or other specifics is still used between landlord and tenant. The practice, however, is by no means as universal today as it appears to have been in the period immediately following the civil war.[47] In fact, the use of this type of rent note is almost nonexistent in some sections of the State; some Georgia attorneys declare that they have never seen such a note. Other attorneys report that such notes are used, though by no means universally, in their communities.

The problem of methods and means with which to pay rent is a common one throughout the Southeast. Contracts of various kinds calling for the payment of products of the soil are frequently used. Though Georgia is the only state in this section which makes notes payable in farm products or commodities negotiable, the rent contract requiring payment in cotton, etc., is in common use in Alabama, Florida,[48] South Carolina and Tennessee. Such contracts are unsuited for purchase as an investment. Bankers in the larger cities will not accept them even as collateral, but there is no doubt that smaller city and country banks do accept them as collateral. It would be hazardous, however, to estimate the frequency of such practice.[49]

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[47]A common form of such a note is something like the following:

"_____ 193_____

"On or before the_____ day of _____ 193____, I promise to pay to_____ or order,_____ bales of cotton, of 500 pounds each, or an aggregate of_____ pounds lint cotton, to class middling, delivered free of charge at_____, with interest at rate of_____ per annum from maturity until paid, for the rent, for year, 193_____, of the following lands situated in_____ County, Georgia:

"This agreement to terminate on_____ day of_____ 193_____.

"_____"

It is not uncommon for the note to contain the terms and conditions on which the tenant occupies the premises. It may provide that the tenant shall waive benefit of homestead and exemption laws and pay attorneys fees in case the note is collected by suit.

[48]In Florida lease agreements wherein the landlord is to receive a certain percentage of the crop are common. Such a contract, is, of course, much different from the notes discussed in the paper, but it indicates that there is a similar problem in both states. For that matter, contracts calling for the payment of a percentage of the crop as rent used wherever landlord-tenant relation exists.

[49]To some extent the small bank in an agricultural community would have to accept rent contracts, in whatever form they might take, as collateral for

In Georgia today, as stated before, the rent note is used between landlord and tenant,[50] particularly in the cotton growing sections of the state, and there is clear evidence that these notes are being used in some cases by the farmer or landlord for collateral security for his personal notes with the banks. There is practically no use of such notes between farmers and their creditors[51] or business men. Georgia banks uniformly say that they will not discount notes payable in specifics,[52] and out-of-state banks declare that they have never seen negotiable notes payable in specifics and state that they most certainly can not accept one of them for discount or purchase.[53]

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loans to farmers and business men in the locality.

As a security to the lender, the Georgia rent note is far better protection, despite its probable uncertain value, than a non-negotiable rent note or contract in Alabama, Florida, Mississippi, South Carolina or Tennessee. Being negotiable, in so far as the instrument has any value, the collateral holder is in a position to recover upon the instrument to its face value without being subject to prior equities.

[50]In fact, the almost unanimous opinion of Georgia bankers and lawyers is that the farmer as a class, is nearly if not always, the only type of person appearing in the role of maker of note payable in specifics.

[51]Two or three decades ago farmers used such personal notes given by themselves in purchasing fertilizers and other materials for growing a crop; but, largely due to the uncertainty surrounding the maturity value of this note, that practice has been replaced by safer methods of financing.

[52]There should be no fundamental objection to the discount of a note payable in specifics if the instrument requires the payment of a sum certain in dollars, with option in the holder to demand cotton, at a certain price per pound. The difficulty with such a form is a practical one. Farmers would not like its terms. If the price of cotton were higher than the stipulated price per pound, the farmer would be reluctant to deliver cotton. If the price of cotton were lower than the stipulated rate per pound, the tenant would want to deliver cotton rather than money. And besides this, from practical necessity most tenant notes must be made payable in specifics. In the abstract, of course, there would be no objection in any state to the negotiability of this form of instrument.

Another note which would be better than the form calling for payment in specifics alone, calls for the payment of a sum certain in money, the maker having the option to pay in cotton at a fixed rate per pound. If the instrument is not paid at maturity, the holder can demand payment of the face value of the note because the option of the maker ceases at maturity. In the event that the maker tendered cotton at the date of maturity, there would be a question of unstable values. It is not likely that the rate per pound fixed in the note will be the exact market rate at that time; if the market price were lower than the rate fixed in the note, the maker could discharge the note in "cheap" cotton, etc. This would make for uncertainty of the ultimate value of the note either for purchase or as collateral, but would be much better than the note payable in specifics only. If payable in specifics, the measure of damages would be the market value of the specifics on the day of maturity.

However, the larger city banks do not care to bother with any note which gives rise to a possibility that they will have to deal with an unstable commodity value.

[53]To summarize, these notes are unsatisfactory because they call for payment in a commodity of relatively unstable value which renders them unsafe for investment or discount purposes or even for collateral. One banker said that his bank would not accept such a note unless they would lend the money without any collateral. So far as their practice was concerned, they had in a few cases accepted such instruments as collateral, but only when such notes

The experience with the note payable in specifics in Georgia shows that bankers and business men have nothing to do with them unless they take them as collateral to protect themselves against bad loans or investments. The possibility of the passing of such a note out of the hands of the payee or his pledgee is negligible because of two factors: (1) the inherent nature of a note which lacks the very qualities desirable in commercial paper for discount and for credit transactions which are found in the ordinary promissory note or bill of exchange, and (2) the present-day unacceptability to the business world of a note of this type. Yet for the purpose which it serves in some sections of Georgia today, in making the financing of farming operations easier, the note probably justifies its use. The statute giving such notes negotiable qualities accords a local credit very helpful in farm financing.[54] Business experience and caution will keep down the general circulation of what would be a generally undesirable type of commercial paper. And the rare occasion when such a note may be transferred to another state and give rise to legal complications[55] does not deserve consideration as an argument against the negotiability of notes payable in specifics.

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were included among other collateral and then without giving any additional value to the collateral because it contained such commodity notes. (This was a large city bank.)

Another difficulty would arise in the case of national banks. Though such notes might be negotiable, still, if the bank purchased them, they would be purchasing a commodity contract, and there is an implied want of power in such banks to deal in commodities. 12 U. S. C. A. § 24. Also it would be very probable that such notes could not be discounted with the Federal Reserve Bank of the district. The Federal Reserve Banks have no authority to discount an obligation which is not payable in money. See 12 U. S. C. A. §§ 343, 348.

Certainly so far as most banks are concerned, there would be no discounting of such notes. They may be used as collateral for the personal note of the borrower in small, agricultural communities, but elsewhere their use for such purpose would be negligible. Such notes will practically never be used in interstate transactions, except perhaps as collateral in a rare case.

[54]One attorney, in writing of the practice regarding these notes in his part of the state, said: "Naturally, every farmer who rents land in the cotton section, makes his rent note payable in specifics, most generally cotton. You can see how difficult it would be to operate farms, and obtain proper credit. were these notes not negotiable. A very large percentage of the farmers' rent notes in the cotton growing area of Georgia are made payable in cotton. It is as universal as the tenant system."

Another attorney writes: "Many landlords borrow from the banks on their rent notes as collateral. If a promissory note, for rent, payable in cotton, were not a negotiable instrument, the bank would not use them. Hence, the wisdom of putting into the negotiable instruments law, the proviso as to cotton or other articles of value."

This paper does not attempt to discuss the use of cotton or warehouse receipts for cotton or other commodities as security for the ordinary promissory notes of the owners.

[55]The writer has been unable to discover a reported case involving the question. Lawyers and bankers questioned about the matter have been unable to suggest any case on the point. However, it would seem, as pointed out above, that if such a case should arise, it would be determined under the ordinary rules of the conflict of laws.

THE INSURANCE CONTRACT—SHOULD A DUTY TO READ BE IMPOSED ON THE INSURED?

*O. B. Triplett, Jr.**

On a day in August, 1930, C. L. Nix acquired a "second hand" Marmon car for $150.00. Ninety days later he insured this car for $600.00 against loss by fire. Within two months thereafter fire destroyed the car and the insurer received notice of its destruction.

The first page of Nix's policy contained the following express warranty:

> "The description of the automobile and the facts respecting its purchase are as follows:
>
> | Actual Cost to Assured including equipment | Purchased by Assured Month | Year | New or 2nd Hand |
> |---|---|---|---|
> | $2250.00 | November | 1928 | 2nd Hand." |

The insurer promptly denied liability on account of this apparent breach of warranty; whereupon Nix brought an action at law to recover the proceeds of the policy and obtained a verdict and judgment for $400.00 therein. To the insurer's plea of the breach of warranty, Nix replied that he gave truthful answers to insurer's soliciting agent; that the misrepresentations of fact were due to errors committed by said agent in recording his oral replies. The insurer appealed to the Mississippi Supreme Court,[1] where the judgment of the lower court was reversed and a judgment rendered for the appellant.

It is significant that the record on appeal in this case contained no denial by Nix that he knew the contents of his policy; he did not state that he had not read the policy; he did not even deny that he knew, at the time, that insurer's agent was erroneously writing down his answers to the questions propounded. Moreover, after his loss, it was evident that he undertook to mislead the company as to the price he had paid for the car; for it was undenied in the record that, in writing, he represented to the company that he had given a $700.00 car and $300.00 in cash, or a total of $1,000.00, for the car insured, indicating a clear design to mislead the company, and to conceal from it what the car actually cost him.

In this inequitable position, Nix was justly denied relief. However, the Court unnecessarily supported its opinion with the following legal pronouncements:

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*Member Forest, Mississippi, Bar.

[1]Springfield Fire and Marine Ins. Co. v. Nix, 162 Miss. 669, 138 So. 598 (1932).

1. " . . . . *the insured here is presumed to have read his policy.*"

2. "*At any rate, having retained the policy in his possession for more than a month, he knew, or ought to have known, the contents of it.* . . . . and, by retaining the policy for a month without calling the attention of the insurer to the material and controlling error made by the agent, if he made one, in recording his answer to the question, his silence ratified, confirmed, and adopted the answer, as set forth in the policy, as his answer and as being true." [Author's italics.]

The *Nix* case was decided on January 11, 1932. Hardly had the echoes of that decision subsided when the Court was confronted with an appeal by the same company from the decision in another case involving a similar policy—this time from a decree in favor of Mrs. E. J. Loving.[2]

The appellant had insured Mrs. Loving's DeSoto 8-cylinder automobile in the sum of $1,150.00 against loss by fire or theft. The policy contained representations that Mrs. Loving had purchased the car for $1,150.00 new in December, 1930, and that it was a "1931" model. There was also a stipulation in the policy by the terms of which Mrs. Loving warranted the truth of these representations, and a provision that if they were not true the policy should be void.

Mrs. Loving's car was stolen and destroyed by fire. She made claim to appellant for the loss. Appellant refused payment upon the ground that Mrs. Loving purchased the car "second hand" and not new, that it was a "1930" model, and that therefore under the policy there was no liability. Mrs. Loving testified that she truthfully answered the questions propounded by appellant's agent and was not asked if she purchased the car new; that the misrepresen-

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[2]Springfield Fire and Marine Ins. Co. v. Loving, 163 Miss. 114, 140 So. 727 (1932).

It may be observed that Nix proceeded at law, whereas Mrs. Loving sought reformation in equity. But either court was empowered to give relief yielding like results. This was strikingly observed in the early case of Planters Ins. Co. v. Myers, 55 Miss. 479, 505 (1877), in which it was said: "If this were a suit in Chancery for reformation of the contract, that court would esteem the verbal statements of Myers, in answer to the interrogatories, as incorporated into the contract, and decree accordingly, if there were no other objections. A court of law would reach precisely the same end, by putting the insurer under an estoppel to insist on a breach of the warranty, or the untruth of the representation. It is but another addition to the numerous instances where courts of law have borrowed principles from the equity courts, and adopted and enforced them. Nor should any limitation be put upon the naturalization into the common law of equitable principles, when its methods of procedure and forms of action are adopted to render complete justice."

tations in the policy were inserted through the error and fault of insurer's agent. Except for the forum invoked and the remedy prayed for, the *Nix* case and the *Loving* case were identical. The policies were in all respects alike. The alleged breaches of warranty were exactly the same.

Had the Supreme Court applied legal standards delineated in *Nix's* case, obviously, it would have followed, by *a priori* logic, that Mrs. Loving's insurance was null and void. Yet the court correctly awarded a recovery to this policy holder, although the court, without any further comment thereon, frankly stated:

> *"Appellee did not read the policy until after she had received notice from appellant denying liability upon the ground above stated."* [Author's italics.]

Correct results were reached by the Court in each case; but pertinent inquiries arise when these cases are compared: (1) Is a policy holder presumed to know the contents of his application and policy? (2) Is he to be charged with negligence for failing so to do? (3) To what extent should he be bound by the language of his contract? The solutions of these questions have created marked discord among the authorities and have often led the courts into a Serbonian bog. Many judges, applying the rules of ordinary contract law, have marched to pitiless conclusions under the prod of remorseless logic which was supposed to leave them no alternative.

Other judges, feeling the urge of a new group of facts, a new combination of events, a new social situation, have been swept by the counter drive to blur and blot and qualify and even to erase, when matching the situation to the rule would create mischievous results.

If the principles of general contract law are applicable to insurance contracts, the rules announced in the *Nix* case support the decision reached, and the *Loving* decision is erroneous; for the rule as correctly stated in the *Restatement of Contracts*[3] is that:

> "One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation."

But in the better reasoned cases the courts have found insurance policies so distinctive among contracts, both in the manner of their inception and in the purpose which they fulfill, that they will not apply to them the principle that a person should be held to

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[3]RESTATEMENT, CONTRACTS (1932) § 70.

a signed statement in those situations where the insurer can be charged with fault *otherwise* sufficient to create an equitable estoppel, notwithstanding the fact that if the insured had been less trustful, less gullible, and more alert, the insurer would have been prevented from paying a loss under a risk which it would never have assumed if it had known the true facts actually instead of by imputation.[4]

A Contract *Sui Generis*

In the first place, insurance is contracted for in a manner unlike that followed in the making of ordinary commercial contracts. The terms of the contract are prepared by experts employed by the insurer; and, in the execution of the contract, the insured is permitted only to say whether he will take it or leave it. The applicant buys "protection" very much as he would any other commodity; the terms of the purchased policy do not result from mutual negotiation and concessions of the parties, and hence do not truly represent an agreement at which the parties thereto have arrived. Being purely a contract of "adhesion," the applicant is naturally caused to refrain from reading the policy.

It is now generally recognized by the public at large, and by courts of highest authority, that *it is only rarely that even careful business men do in fact read insurance policies delivered to them.* "The prevailing business custom is for the insured to rely upon the accuracy, skill, and good faith of the person who acts for the insurer in filling out the application, delivering the policy, and collecting the premium."[5] Prudent men do not think it necessary, or an economical use of time, to examine either the application or the policy in order to detect any fraud or mistake on the part of the insurer's representatives whom they trust and believe to be expert

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[4]"The new doctrine experienced a slow and uncertain growth struggling with the inconsistent common-law rules, but in 1871, the year in which the leading case of Union Mutual Life Insurance Co. v. Wilkinson came up for decision in the Supreme Court of the United States, the editor of the fifth edition of American Leading Cases could state the law as follows: 'The better opinion would accordingly seem to be, that the insurers cannot take advantage of the misstatement or omission of any fact which it was their duty to set forth and state correctly in view of all the circumstances, and that this will be true even when the defect occurs in the application or other document which, though signed by the insured, is prepared by themselves, or by any one whom they have duly authorized, with a knowledge of or an opportunity to know all the material circumstances.' . . .

"The clear and forceful opinion of Justice Miller in this celebrated case seems to have received general approval throughout the country. The doctrine allowing parol testimony to be received in an action at law to estop the insurer from claiming the benefit of a dishonest defense spread with great rapidity and came ultimately to be accepted in all of the states of the Union, excepting New Jersey and Massachusetts." Vance, Insurance (2d ed. 1930) 498, 499.

[5]Vance, Insurance (2d ed. 1930) 214-215.

in the business of preparing applications and policies in such a way as to cover the risk sought to be insured. Influenced by these considerations, one writer has suggested that the transaction giving rise to an insurance policy closely resembles the sale of an ordinary commodity. He says:[6]

> "In the every-day language of the streets, a man 'buys' insurance. This terminology, upon examination, does not seem so metaphorical as at first it may appear. The policy, it has been pointed out, is in effect a highly complex machine, as intricate and as incomprehensible in its details to the layman as an automobile. He looks upon the two in very much the same way. The one is a vehicle of physical transportation, the other of financial protection. Each is a commodity sold him by the agent of the producer. If his automobile breaks down and fails, in consequence of defective mechanism, to afford efficient transportation, he can hold the manufacturer responsible on an implied warranty of fitness. If his insurance policy breaks down and fails to cover the risk for which it was secured, why should he not be able to hold the insurer responsible on a similar warranty? This analogy apparently has never been expressed by any court, although the opinions of several would seem to suggest it. At least it seems to rationalize more plausibly the result which many courts are reaching than the 'false pretenses' and 'conclusive presumptions' which they have expressly mentioned. The implied warranty of reasonable fitness for an intended purpose has not been confined to the law of sales. It has been applied to bailments of chattels for hire, to the leasing of furnished dwellings for short terms, and in at least one state to leases in general. Its extension to insurance law does not seem strained in view of the results already being reached by the courts."

If, therefore, the ultimate goal and purpose of the law is the promotion of the welfare of society, a recognition of the actualities of business life leads us perforce to remark: (1) For the courts to say that the insured is presumed to know the contents of his policy and application is to indulge in a violent presumption—so contrary to fact that it cannot be justified. A presumption is founded upon "a knowledge of human nature and the motives which are known to influence human conduct."[7] Hence the presumption announced in *Nix's* case is believed to be unsound. (2) For the courts to attribute negligence to a policy holder, when he has failed

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[6]Comment (1925) YALE L. J. 203, 207.
[7]Jackson v. Warford, 7 Wend. 62 (N. Y. 1831).

to read over his application before signing same, or his policy subsequently delivered with application attached (or not attached), is to utterly disregard the fact that substantially all policy holders act alike and to ignore the accepted definition of negligence as conduct falling below the standard to which reasonable men under like circumstances conform.[8]

In the recent case of *Home Fire Insurance Co. v. Thornhill*,[9] Mississippi has aligned herself in part with the second conclusion by expressly deciding that:

> " ' . . . . the insured is not chargeable with such negligence as will render him liable for false answers inserted by the agent merely because he signed the application in blank and trusted to the agent to fill it out, or because he signed an application filled out by the agent *without reading it.*' 5 Cooley's Briefs on Insurance, pp. 4131 and 4136; Lewis v. Mutual Reserve Fund Life Ass'n (Miss.) 27 So. 649; Fidelity & Casualty Co. v. Cross, 131 Miss. 632, 95 So. 631."

The Court, in a later paragraph of its opinion, added:

> "The cases holding to the contrary are generally based on the leading case of New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 S. Ct. 837, 29 L. Ed. 934; but as pointed out in 5 Cooley's Briefs on Insurance (2nd Ed.) 4143, and by this court in the Lewis case, supra, a copy of the application containing the false answers was attached to (and made a part of) the policy there issued, and, as hereinbefore stated, such is not the fact here. *What the rule would be in that state of case is not here presented.*" [Author's italics.]

Regardless of the contents of the policy, it is submitted that in recognition of the actualities attending the purchase of insurance "protection," the rule should be the same, and that the law of *New York Life Ins. Co. v. Fletcher*[10] is unsound in respect to this rule and has been repudiated by the majority of state courts.

The facts involved in the *Fletcher* case were unfortunate and misleading. The insured had been seriously ill with diabetes and

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[8]32 C. J. 1336, § 604; 45 C. J. 624-31, § 1.

[9]165 Miss. 787, 144 So. 861 (1932). In this opinion are to be found all of the earlier Mississippi cases. See Lewis v. Mutual Reserve Fund Life Ass'n, 27 So. 649, 650 (Miss. 1900): "How can it be inexcusable negligence not to read, when one cannot read?" *Cf.* Maryland Casualty Co. v. Adams, 159 Miss. 88, 131 So. 544 (1931). Of course, the suggestion of illiteracy cannot prevail, as there cannot be two separate departments in the law of contracts, one for the educated and another for those who are not.

[10]117 U. S. 519, 6 Sup. Ct. 837, 29 L. ed. 934 (1886).

knew that he was uninsurable. The insurer's agents wrote out false answers in the application which the insured signed without reading, and by that means, with probably collusive aid from the examining physician, the policy in suit was procured. It was obvious that the insured did not occupy an equitable position. He either knew or should have known that the agents who had undertaken to procure insurance for an uninsurable man were acting fraudulently. Under such circumstances the beneficiary could ask nothing of equity. The insurer was entitled to a judgment, whether at law or in equity.

While the result of the *Fletcher* case was undoubtedly correct, the general intent of the opinion was unmistakably hostile to the allowance of parol estoppels in actions at law upon insurance policies.

The Federal Supreme Court has not followed a consistent rule in regard to the allowance of parol estoppels in actions at law upon insurance policies, however; for, subsequent to its decision in the *Fletcher* case, the case of *McMaster v. New York Life Ins. Co.*[11] came before it, wherein oral testimony had established that McMaster applied for the issued policy on December 18, 1893; that the policy was delivered on December 26, 1893; and that McMaster paid the first annual premium and inquired of the insurer's agent if the policy was as represented, and if it would insure him for the period of thirteen months, to which the agent replied that it did so insure him. In fact, the policy was antedated December 12, 1893; and the date of the next premium payment was thereby advanced without the knowledge or consent of insured, the proof being that McMaster did not read the policy. He died January 18, 1894; and the defense was that the insurance had been forfeited by his failure in payment of the second annual premium on or before January 12, 1895, that is to say, within thirty days after December 12, 1894, when the company contended it became due. Yet the court, through Mr. Justice Fuller, did not hesitate to say that McMaster's failure to read his policy when delivered was not such negligence as to estop his administrator, as beneficiary, from denying that the insured, by accepting the policy, agreed to the antedating of the premium payments.

By coincidence, on the day when the *McMaster* case was handed down, the Federal Supreme Court heard argument on the case of *Northern Assurance Company v. Grand View Building Association.*[12] The case arose upon the following facts as found by the jury: The insurer issued to the insured a policy of fire insurance containing

[11] 183 U. S. 25, 225 Sup. Ct. 10, 46 L. ed. 64 (1901).
[12] 183 U. S. 308, 225 Sup. Ct. 133, 46 L. ed. 213 (1902).

the usual clause avoiding the insurance if the insured then had other insurance on the same property without the consent of the insurer indorsed on the policy. It also provided that no representative of the company should have power to waive this condition unless such waiver should be written on the policy. At the time the policy was issued, the insured had other insurance on the same property, of which he informed insurer's soliciting agent, but the consent of the insurer was not indorsed on the policy. The coverage of the two policies almost equalled the value of the insured property; and, within the term of both policies, fire destroyed the property thus protected. Proofs of loss being duly made, the insurer declined to pay on the ground that the policy had become void by breach of the condition against other insurance. The Supreme Court of the United States upheld this defense on the part of the insurer, Chief Justice Fuller and Justices Harlan and Peckham dissenting. The majority of the court held that evidence of the information given to the agent of the existence of other insurance was not admissible to establish an estoppel against the insurer, but on what grounds this decision is based it is extremely difficult to ascertain as the confused opinion resists analysis. The opinion states that "The question before us is therefore reduced to one of waiver." Nowhere does the opinion indicate that the writer, Mr. Justice Shiras, appreciated a possible distinction between waiver of a known defense and estoppel to set up an inequitable defense. Even when he uses language competent to describe an estoppel, he comments:

> "This mode of reasoning overlooks both the general principle that a written contract cannot be varied or defeated by parol evidence, and the express provision that no waiver shall be made by the agent except in writing indorsed on the policy."

Waiver v. Estoppel

It is obvious that this grievous decision by the Federal Supreme Court is directly opposed in principle to the *McMaster* case and is in complete conflict with the Mississippi decisions—notably *Springfield Fire and Marine Ins. Co. v. Loving*[13] and *Home Fire Insurance Co. v. Thornhill.*[14] But, recently, in a third Mississippi decision,[15] the court apparently lost sight of the principle of an equitable estoppel and reached an unsound result by treating the case as if the issue were one of waiver.

In that case the bill of complaint alleged that on or about the 16th of May, 1929, one F. A. Falls approached the general agent

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[13]163 Miss. 114, 140 So. 727 (1932).
[14]165 Miss. 787, 144 So. 861 (1932).
[15]Maryland Casualty Co. v. Adams, 159 Miss. 88, 131 So. 544 (1931).

of the appellant company at Amory, Miss., and informed him "that he desired to obtain a policy which would protect him against accidents on his outfit, a new ¾ ton International truck and trailer," and, at the same time handed to the said agent, "the privilege licenses just obtained on his car and truck"; that the said agent asked the said Falls what he was going to haul, and was informed that "he was going to haul logs and lumber"; that the agent then informed Falls that the premium for such policy was $22.20, which was paid; that the said agent then drew up the policy, "which he did not read to the said Falls, and which the said Falls on account of his illiteracy was unable to read, and which policy said agent fraudulently gave him no opportunity to read, but handed the policy to him, fraudulently saying: 'This is what you want, and this will protect you against damage to third persons on account of injuries that may accrue in the operation of this outfit.' " The bill further alleged a subsequent and timely automobile collision demand on the insurer; that the insurer denied all liability under the policy because of a condition in the policy providing that the policy did not cover the automobile described therein while being used for towing any trailer. The Supreme Court reversed the decree of the lower court upholding the bill on demurrer, the opinion stating that the insured, though illiterate, was not excused from his failure to discover this exclusion clause, he having had the policy in possession for four months.

It is submitted that these facts not only gave rise to an equitable estoppel as applied in the *McMaster* case, but that the estoppel should have been applied regardless of the insured's literacy; for no presumption that the policy was read could be indulged in, nor was there any negligence involved in his failure so to do.[16]

In *Hartford Fire Insurance Co. v. Clark*[17] the insurer's agent knew when preparing a fire insurance policy that the applicant did not hold a fee simple title to the land on which the building was located; but the application stated that he did. In that case, as in the *Adams* case, it appeared that the insured relied upon the local

[16]The exact question was pretermitted in Fidelity and Casualty Co. v. Cross, 131 Miss. 632, 95 So. 631 (1923). There the agent was informed by the insured that he had recently suffered an attack of influenza but was advised that this would not affect his ability to secure the policy applied for. The insured was perfectly literate—a physician for 35 years. Yet the court said: " . . . . appellant contends that by accepting the policy, he was chargeable with notice of the contents of this application. Conceding that this is true, still, in view of the fact that appellant issued this policy on an unsigned application, and that the applicant was led by the agent of appellant to believe that the omitted information was not material, the appellant cannot defend on the ground that the application failed to disclose material information called for thereby."

[17]154 Miss. 418, 122 So. 551 (1929).

agent and accepted the policy as one covering the risk. In neither case should the insurer be permitted to escape its liability; for as was said in the *Clark* case, quoting from *Rivara v. Ins. Co.*[18]:

> "In such case the insurance company cannot claim that it has been wronged or deceived, and to permit it to issue a policy and take the benefits of the contract, knowing at the time that it is not bound thereby, and afterwards to avoid liability thereon, upon the grounds that something existed or did not exist of which the company or its agent was fully aware at the time the contract was made, would be repugnant to that sense of justice and morality which is and should be inculcated by law."

In fact the following hypothetical situation almost exactly parallel with *Maryland Casualty Company v. Adams* is given an excellent discussion by Professor William R. Vance of the Yale Law School:[19]

> "P has erected a building on leased land. He applies for insurance to cover the risk, giving the agent accurate information as to the title. The agent delivers a policy saying, 'Here is your policy, fully covering your risk,' and collects the premium payable for insurance of the kind applied for. P, acting as do a very large majority of ordinary prudent persons under similar circumstances, assumes that the agent has delivered the coverage asked for, and puts the policy in his safe without attempting to read it, knowing full well that he could not understand it if he did so. Therefore he does not learn until a fire loss occurs that the policy contains a condition that it shall be void if the building insured is on leased ground."

No waiver is involved; for there is no evidence whatever of any meeting of the minds of the parties in an attempted modifying agreement, which of course, could not be shown even if it had been made. But we do find, all the elements of an estoppel against the insurer who seeks to take advantage of the breach of condition.

> "The insurer has made a false statement of a material fact—that the policy validly covering the risk—knowing that it would be relied on. The insured relied on the statement, as he was privileged to do since he had no actual knowledge of its falsity, *and his failure to read the policy was not such negligence as to impute knowledge to him.* Being so misled he both acted, in paying the pre-

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[18]62 Miss. 720, 729 (1885).
[19]VANCE, INSURANCE (2d ed. 1930) 515.

mium, and refrained from acting, in that he made no further effort to secure insurance, both to his prejudice. There seems to be no reason whatever for not holding the insurer estopped to deny the truth of his representation, whether by words as here, or by acts, as in the more usual case, that the policy was valid at its inception. And of course the parol testimony rule has no application to proof of estoppels, which are shown not to modify any provisions of the contract, but to prevent the insurer from saying that the policy which he had falsely asserted to be valid was really to his knowledge invalid all the time."[20] [Author's italics.]

The same writer says later:[21]

"The equitable origin of equitable estoppel must not be forgotten. The petitioner for estoppel must have clean hands. His claim must be made in entire good faith. If therefore the insured knew the real facts, he cannot honestly claim that he was misled by the insurer's misrepresentation. If the insured knew or had good reason to suspect, at the time the policy was delivered, that it was voidable by its terms, he cannot claim that he was misled by the insurer's statement that it was valid. If he has made false statements to the agent or the insurer, he is in no position to claim an estoppel against the insurer's taking advantage of the consequent breach of condition merely because the agent or the insurer himself knew that they were false when the policy was delivered. He knows that he is not entitled to a valid policy. But to deprive him of his claim of estoppel the insured's knowledge must be such as affects his conscience and negatives his good faith, that is, actual knowledge of the facts involved in the claim of estoppel or of such facts as put him on inquiry. Constructive or imputed knowledge is not sufficient. The mere fact that he has the means of learning the truth for himself does not deprive him of the privilege of relying upon the insurer's representation. Hence while a general rule of law imputes to the insured

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[20] VANCE, INSURANCE (2d ed. 1930) 516. The case of Maryland Casualty Co. v. Adams, 159 Miss. 88, 131 So. 544 (1931), appears to fall completely within this illustration of fraud as defined in RESTATEMENT, CONTRACTS (1932) § 471: "*A* and *B* complete an oral negotiation and *A* assumes the function of reducing the agreement to a formal writing for the signature of the parties. *A* purposely omits one of the terms orally agreed upon and presents the writing to *B* for signature. This is an implied representation that the writing accords with the oral agreement, and is fraud."

[21] VANCE, INSURANCE (2d ed. 1930) 524-25.

knowledge of the terms of the policy which he accepts, such imputed knowledge does not negative his good faith in relying upon a representation made by the insurer as to the operative effect of such policy. Therefore, it is no answer to the insured's claim that the insurer is estopped to deny that he is bound by the policy which he delivered as and for a valid contract, to say that he is presumed to know the terms of the policy or that he was not privileged to rely on the insurer's false representation when by reading the policy delivered he might have discovered the truth."

With respect to the court, it is submitted that the statement of the insurer's agent in *Maryland Casualty Company v. Adams* was as deceptive, as fraudulent, and as misleading as if he had made a false insertion in the application. True it is that the insured could have discovered the exclusion clause had he read the policy, but he had every reason to believe that it was not contained therein, and he should not have been held at fault in not reading his policy.[22]

Conclusion

The distinctions sought to be drawn by the courts in the cases discussed are without difference. The insurance contract is *uberrimae fidei;* and when the insurer's agent so acts as to violate this principle, the company should not be permitted to profit thereby.

Let us generalize:

"That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth have found its

[22]In an interesting comment relative to the troublesome questions presented in connection with the subject under discussion, one court observed that marine insurance litigation has been free from conflict on these matters by reason of the fact that the marine insurer sits still and asks no questions, his policy being issued upon proposals made by brokers to whom the insurer pays a commission, but who are regarded without question as acting as agents of the insured. This feature, the court noted, is in contrast with the writing of accident and life insurance, where the agents of the insurer are equipped with forms for taking applications and are expected to submit those forms properly filled in by the insured and signed by him. Newsholme Bros. v. Road Transport & G. Ins. Co. [1929] 2 K. B. 356.

health and life. It is not and should not be stationary. Change of this sort should not be left to the legislature."[23]

"The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. 'Ethical considerations can no more be excluded from the administration of justice which is the end and purpose of all civil laws than one can exclude the vital air from his room and live.' Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all. There is an old legend that on one occasion God prayed, and his prayer was 'Be it my will that my justice be ruled by my mercy.' That is a prayer which we all need to utter at times when the demon of formalism tempts the intellect with the lure of scientific order. I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, *they must let the welfare of society fix the path, its direction and its distance.*"[24] [Author's italics.]

Whether or not recognition is given thereto, a pragmatic approach by our courts has properly resulted in building up a system of rules and probably a department within our law which has become applicable to insurance only.[25]

Diversity of treatment in regard to insurance contracts has its origin and warrant in diversity of social needs. A classification or a diversity of treatment based on these needs is not arbitrary.

It is, therefore, suggested that more accurate and more just results will be attained by the courts if frank expression is given

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[23]Wheeler, J., in Dwy v. Conn. Co., 89 Conn. 74, 99, 92 Atl. 883, 391 (1915). "It is the function of our courts," says an acute critic, "to keep the doctrines up to date with the mores by continual restatement and by giving them a continually new content. This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril." A. L. C. [orbin], Comment (1920) 29 YALE L. J. 767, 771.

[24]CARDOZO, NATURE OF THE JUDICIAL PROCESS, 66.

The writer of this article acknowledges the adaptation to his use of many portions of the works of Mr. Justice Cardozo and Professor William R. Vance herein cited, for whose reasoning he has profoundest esteem.

[25]Since this article was prepared by the writer, an excellent article, *The State and the Social Process*, by Chief Justice Sydney Smith, has appeared in 9 MISS. L. J. 147 (Dec., 1936), and is closely related hereto in its philosophy.

to the influences which have drawn a line of demarcation between insurance law and general contract law; if a "sensible approximation" of these two branches of law will be their aim. In regard to the rules hereinabove discussed, intrinsic justice will more often result by an application of the rule that the rights of the insurer and insured are to be determined from the written contract only when the insurer is free from fraud, misrepresentation, mistake or other fault which would cause the general rule to operate inequitably upon the insured. In mediating between the existing equities, the court should refuse to charge the insured with a duty to read his policy, or with the presumption that he has done so, or with negligence in not having so done. The function of the courts is to balance the equities in the light of the actualities attendant upon insurance transactions and to assign, as far as possible, a proper value to each, summoning to its aid all the distinctions and analogies that are the tools of the judicial process. A too definite formulation of the rules applicable to this evolving area of the law might well crystallize the law in a form which would hinder development.

GOVERNMENT AND PROGRESS IN THE SOUTH*

A. B. Butts†

My subject today is *Government and Progress in the South.* My professional interests are government and law. One cannot exist without the other. Using the words of my subject, *Government and Progress in the South,* I am sure that there could be no such thing as progress in the South—indeed, progress anywhere in the world—without government and without reasonably good government at that . . . . When we speak of better government, we do not mean merely to play with phrases; we mean a continuing improvement of the rules and regulations under which individuals live their lives.

Progress in the South depends very largely upon the right kind of government. That is true everywhere today. At no time in the history of the world has it ever been clearer that the happiness of mankind depends to a very large degree upon their government and their governors. There are about seventy nations in the world. If we call the roll of the nations today, we are forced to the realization that in most of them liberty is on trial for its life. Dictatorships for the time being may improve conditions under which people live, but inevitably they are subversive of a moral and humanitarian order; their structures crash and chaos results. If democracy wishes to win in the battle with dictators and autocrats, democracy must be constantly on the alert that it may be more efficient and more honest. People are likely to become impatient with democracy when there are too many evidences of inefficiency and too frequent examples of dishonesty in government. If a strong-willed, ambitious autocrat can get his stage set properly by pointing to waste, incompetency, inefficiency, and, above all, dishonesty in high places, he knows that he has inviting ground for establishing himself as a dictator, immediately after which he can ride ruthlessly over the rights and liberties of the people. Who would forecast a secure government for Italy when Mussolini has passed from the stage? How ominous of national tragedy is Hitler's Germany. What irony in the professions of communism in support of a people's liberty is revealed in Soviet Russia.

Political scientists generally agree that the most profound con-

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*This is the substance of an address delivered at the Centennial Celebration of Emory University, Atlanta, Georgia, December 10, 1936. The first part of the address is omitted. There tribute was paid to Augustus Baldwin Longstreet and L. Q. C. Lamar, distinguished lawyers and educators. Longstreet served both Emory and the University of Mississippi as president. Lamar was an alumnus of Emory and Professor of Law at the University of Mississippi.

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tribution to political thought in America is *The Federalist*, that great collection of articles written by Hamilton, Madison, and Jay. *The Federalist* has been called "a lawyer's brief by the framers of the Constitution in support of their handiwork."[1] In the very first of the articles Alexander Hamilton says:

> "It has been frequently remarked, that, it seems to have been reserved to the people of this country, to decide by their conduct and example, the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force."

And Hamilton adds:

> "If there be any truth in the remark, the crisis, at which we are arrived, may with propriety be regarded as the period when that decision is to be made; and a wrong election of the part we shall act, may, in this view, deserve to be considered as the general misfortune of mankind."[2]

Certainly we here assembled recognize the fact that a wrong election of the part we shall act today and every day in this country will inevitably be a "misfortune of mankind."

In order to discuss this subject from what I believe to be an eminently practical point of view, we shall examine briefly some important phases of, first, federal relations; second, state government; third, local government.

At no time in the nearly one hundred and fifty years since the establishment of the national government has the question of federal relations been so important to the states. We can no longer get a discussion on the subject of states' rights. Long ago it was pointed out that the "ins" were for power centralized in the federal government—for loose construction of the Federal Constitution, and that the "outs" were for power focused in the state government—for strict construction of the Constitution. Today one is inclined, without being facetious, to observe that even the "outs" must find something more substantial to talk about than the strict interpretation of the constitution.

Perhaps we may for the moment be going too far in federal assistance to the states. Be that as it may, we shall never go back to the days of Hoover and Coolidge. Regardless of what political

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[1] FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT (1930) 6.
[2] See 1 THE FEDERALIST (John C. Hamilton's ed. 1885) 49; and other editions of THE FEDERALIST.

party may be in power in the federal government, a large part of the social security program will continue to operate. The development of science and technology has forced a revamping of many parts of our government machinery. It should bring about in the next decade many other changes. Everybody knows that many undesirable results have come from the operation of the federal government in spheres of activity which formerly concerned only the states and the local governments, but we may believe that some undesirable results have been inevitable in so vast a program. All of us can endorse a sane business-like program of the federal government even though it ignores all state lines and even all local government lines.

In my opinion the years just ahead demand that we here in the South work vigorously for the improvement of our state and local governments. There is still too much incompetency in and about our forty-eight state capitols. We might be academic enough to discuss state government under the heads, the legislative, the executive, and the judicial departments. If we should do that, I should be inclined to say in bold strokes that we need smaller and better legislatures; and that we need in many of the Southern states, as well as in states in other sections of the country, to have a general overhauling of the machinery of government. These necessary changes can be made only by state constitutional conventions. It is true that times of strain and stress and of more or less disturbance are probably not the best times in which to have meetings of constitutional conventions. On the other hand, the ultra-conservatives who constantly cry "Don't tamper with the Constitution!" become very real public menaces. Scarcely any man-made organizations, except governments, go on the theory that all "things that were and are" should necessarily remain without change. Change does not necessarily indicate progress; but progress on any broad scale almost of necessity involves change.

If some state, as a type of experiment station in state government, would or could assemble a constitutional convention whose personnel, or at least a safe extraordinary majority of whose personnel, were men who would give to the public an assurance that they would never again seek any type of public office, we might really see outstanding accomplishments. There are so few people in public life who can bring themselves to see the whole state, rather than their local communities, for the very practical reason that the man in public life wants to be re-elected to the office which he holds or to some other office. Consolidations of counties, of offices, and of institutions are greatly needed if we are to have a more efficient democracy; but so long as law makers, whether they be members of state legislatures or members of constitutional con-

ventions, fear the local electorate or have local business interests of their own to be served, we shall be handicapped in making democracy more efficient. If we could eliminate from our state legislatures the possibility that the members themselves may hold appointive offices in other departments of the state government; if we could have in our legislatures the type of men who simply will not feel that it is their duty to seek appointive jobs for their relatives, we might have more intellectual honesty in government.

I mention these matters merely as examples for our consideration on this subject of government and progress in the South. We need smaller legislative bodies; we need legislative reference bureaus; we need expert legislative draftsmen—we need all three for obvious reasons. In a state like my own, of eighty-two counties, certainly a well prepared legislator from each county, or a total of eighty-two, in the lower house, and a total of about a fourth that number in the upper house, would be entirely sufficient.[3] The body would be representative and at the same time it would not be too unwieldy for consistently good work.

As for a legislative reference bureau, every person with the slightest knowledge of legislative affairs knows that of all the things members of a legislature need, one of the most important is to have facts placed before them on the various problems which concern them. Every state ought to consider that there are forty-seven potential laboratories from which it may receive valuable information. Every state ought to have a legislative reference bureau, gathering material from the other forty-seven states.

That every state legislature should have an expert draftsman is too obvious for comment. Too long have legislatures left to a very few lawyer-members of the body the task of drafting all legislation. The members of my own profession, the lawyers, are bogged down in a quagmire of *stare decisis;* our lawyer legislators are steeped in the atmosphere of precept and custom. "To stand by decisions and not to disturb settled matters," is not a bad principle of judicial procedure; but if it is habitually followed in law-making bodies it brings absolute stagnation in government.

And then the governor—the executive department. About all we can say here is that fortunate is the state which finds that the electorate have chosen a well trained, alert, honest man as governor of the state—one who has a sufficient amount of adventurous courage about him, and who, above all things, will not delegate his thinking to others.

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[3]It will be of interest to follow the results in Nebraska, where in January, 1937, a one-house legislature of forty-three members commenced its work.

Then for the courts—the judiciary. There is a great deal here that might be said, and to say a little may lead to misunderstanding. There can be no good government unless the lawyers and courts are efficient and honest; and, as a matter of fact, most lawyers are certainly as efficient and honest as most men in other businesses and professions, and most courts are as efficient and honest as other departments of the government. But throughout the ages lawyers have, first once and then again, been subjected to severe criticism. Perhaps the lawyer has more opportunities to perpetrate dishonesty upon individuals and upon the government than has a member of any other profession. The legal profession, however, suffers the criticism on this score because of the misconduct of a very small percentage of its members. Judges, of course, are first lawyers; and just as the public likes to criticize lawyers, so it frequently heaps an undeserved strict censure upon the court systems. At the very time when the public is prone to criticize courts for their methods and their results in some outlandish and sensational criminal trial, the vast majority of courts and lawyers are ably serving that same public in all types of business relations and civil matters which involve the property and happiness of the people, but which attract no attention from the critics.

Yet there is much which should be done in the judicial branch of the government if we are to have real progress through government. Since lawyers are officers of the court, requirements for the practice of law should be raised and should be rigidly maintained. In many instances courts should be consolidated. Certainly procedure should be vastly improved, for the securing of justice does not demand procedural rules which have long since served their day. But, again, consolidation of courts means elimination of jobs. Legislators are influenced by job holders. Progress, therefore, in this direction, too, will be slow.

Then comes the vast field of local government. Everywhere one turns, one sees possibilities for more efficient and less expensive government. If we could only operate the government of our cities and towns and counties on the idea that the people who pay the bills—and that means all the people—should have good service at a reasonable cost; if governors and mayors and county commissioners or supervisors could only be brought to keep constantly before them the fact that public office is a public trust, instead of the idea that public office gives them some proprietary rights; if we could only accomplish these and some other obvious necessary changes in local government, we should no doubt be able to make definite progress. Again, if we could only get governors and mayors and county commissioners, and all other public officials, to handle all government matters on the basis of merit and merit alone, and

never on the basis of political expediency and logrolling or swapping "my support of your measure for your support of my measure," we should more definitely arrive somewhere in our pursuit of better government.

All of which seems to come down to this: We need more efficient government machinery. We need, above all things, honest men to operate the machines of government. If we determine to act intelligently in the management of public affairs, we shall not be forced to make the choice suggested by Pope in *An Essay on Man,* when he said,

> "For forms of government let fools contest;
> Whate'er is best administer'd is best."

Quite the contrary; we should strive for thoroughly workable forms of government as well as for able and honest administrators.

I feel certain that it is not out of place . . . . to close this discussion by quoting from a speech which was made sixty years ago when John Hopkins University first opened its doors to students. A program was arranged for the day before the first classes met. Huxley had journeyed from England to make an address on that occasion. Reminding his audience that good government depends upon the excellence of the individual citizen, he said:[4]

> "I constantly hear Americans speak of the charm which our old mother country has for them. . . . But anticipation has no less charm than retrospect, and to an Englishman landing upon your shores for the first time . . . there is something sublime in the vista of the future. Do not suppose that I am pandering to . . . national pride. I cannot say that I am in the slightest degree impressed by your bigness, or your material resources, as such. Size is not grandeur, and territory does not make a nation. The great issue, about which hangs a true sublimity, and the terror of overhanging fate, is what are you going to do with all these things? What is to be the end to which these are to be the means? You are making a novel experiment in politics on the greatest scale which the world has yet seen. . . . You and your descendants have to ascertain whether this great mass will hold together under the forms of a republic, and the despotic reality of universal suffrage; whether state rights will hold out against centralization, without separation; whether centralization will get the better, without actual or disguised monarchy;

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[4]THOMAS H. HUXLEY, AMERICAN ADDRESSES (1877) 124-26, quoted more fully by FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT (1930) 164-67.

whether shifting corruption is better than permanent bureaucracy; and as population thickens in your great cities, and the pressure of want is felt, the gaunt spectre of pauperism will stalk among you, and communism and socialism will claim to be heard. Truly America has a great future before her; great in toil, in care, and in responsibility; great in true glory if she be guided in wisdom and righteousness; great in shame if she fail. I cannot understand why other nations should envy you, or be blind to the fact that it is for the highest interest of mankind that you should succeed; but the one condition of success, your sole safeguard, is the moral worth and intellectual clearness of the individual citizen. Education cannot give these, but it may cherish them and bring them to the front in whatever station of society they are to be found; and the universities ought to be, and may be, the fortress of the higher life of the nation."

LEGAL STATUS AND CLASSIFICATION OF MUNICIPALITIES IN MISSISSIPPI

*William Hemingway**

Prior to the Constitution of 1890 no reference was made in any constitution as to the government of municipal corporations[1] or the passage of laws relating to them. All municipalities operated under what are called private-corporation laws and were amended according to the laws relating to such private corporations.[2] In order to establish uniformity among municipal corporations, the Constitution of 1890 contains two sections[3] which relate to municipal corporations. Section 80 reads:

> "Provision shall be made by general laws to prevent the abuse by cities, towns, and other municipal corporations of their powers of assessment, taxation, borrowing money, and contracting debts."

Section 88 lays down the requirement that

> "The legislature shall pass general laws, under which local and private interests shall be provided for and protected, and under which cities and towns may be chartered and their charters amended, and under which corporations may be created, organized, and their acts of incorporation altered; and all such laws shall be subject to repeal or amendment."

The private charters then existing in the main contained the same contents but differed as the various localities felt best for their own particular interest.

In the provision for the Code of 1892, the legislature having in mind the desire of the constitutional convention, enacted Section 3035, which provides, among other things:

> "From and after the date that this chapter becomes operative every municipality in the state shall exercise the powers conferred herein on the class to which it belongs and shall be governed by the provisions thereof. But an existing municipality, by resolution of its corporate au-

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I am greatly indebted to the office of Secretary of State for valuable information from its collection of the dates of all charters with all amendments. This compilation required a great deal of time and patience with no funds available to pay therefor. It would be well if this material were published.

[1]The term "municipal corporations" includes cities, towns, and villages.

[2]Attention is directed to the case of Yazoo City v. Lightcap, 82 Miss. 148, 33 So. 949 (1903), and to the brief filed by Judge J. A. P. Campbell and other attorneys and the opinion by Whitfield, C. J.

[3]MISS. CONST. (1890) §§ 80, 88.

> thorities, entered of record and certified to the Secretary of State within twelve months after this chapter becomes operative may elect not to come under provision hereof."

The remainder of that section deals with the procedure.

In the chapter referred to by Section 3035 the Legislature had enacted what it regarded as a model charter for all municipalities, thereby giving a general charter which could be adopted by any municipality.[4] Some availed themselves of that opportunity; others did not. There thus came into existence in addition to private-charter municipalities a new class of municipalities known as code-charter municipalities. The Code of 1892 classified the powers of municipal corporations in some sections of general application, and then beginning with Section 2926 and concluding with Section 2957, enumerates the general powers of municipal corporations governed by a mayor and board of aldermen. Section 2958 gives additional powers to cities and towns but not to villages. This division ends with Section 2970. Beginning with Section 2971 and concluding with Section 2976, there are set forth additional powers of cities and towns having more than 1,000 inhabitants. The remainder of the chapter deals with general matters such as officers, meetings, assessment of property, issuance of bonds, and other matters which seem to apply to all municipal corporations.

Prior to the adoption of this code all charters were private, and, according to Judge Campbell, municipalities were incorporated as other corporations. Chapter 25 of the Code of 1892 provided only for private corporations; consequently all municipalities created or incorporated since the Code of 1892 must be code-charter municipal corporations under Chapter 93. Those prior to this code, which have not accepted it or the commission form of government or the code-charter, still have a private charter.

The Code of 1930, now in use, follows the general outline of the Code of 1892 except that it names the different forms of municipal corporations and provides in Section 2623 that

> "All the preceding sections of this chapter shall apply to all municipalities operating under the common statutory charter for municipalities known as chapter 99, Mississippi Code 1906, or that may hereafter elect to come under the provisions of said preceding sections of this chapter; . . . . provided, however, that none of the preceding sections of this chapter shall repeal any of the provisions of private or special charters."

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[4]It appears in MISS. CODE ANN. (1892) c. 93.

It provides in Section 2624 that all municipalities now operating under Chapter 99 of the Code of 1906 shall be designated as having a "Code Charter," and all municipalities under succeeding sections shall be designated as having a "Commission form of Government," and all other municipalities shall be designated as having "Private Charters." Provision is made in the section for the adoption of the code charter. The Code of 1930 also makes the same divisions of its content that we find in the Code of 1892. In Section 2369 municipalities are divided into classes—cities, towns, and villages. Those having 2,000 inhabitants or more are cities. Those having less than 2,000 and not less than 300 inhabitants are towns, and those having less than 300 but not less than 100 are villages. No municipal corporation may be created with a population less than 100.[5]

Section 2625 of the Code of 1930 provides how charters of municipalities not coming within the code chapter may be amended. It reads in part:

> "When a municipality now existing, which has not come under the foregoing provisions of this chapter, but is governed by another charter, shall desire to amend its charter, the same may be done in this way: The mayor and board of aldermen, city council, or municipal authority, by whatever name known, [then follows the procedure] . . . . If the attorney-general be of the opinion that the proposed amendment or amendments are consistent with the constitution and laws of the United States and of the constitution of this state, even though inconsistent with the provisions of this chapter, the governor shall approve the proposed amendment or amendments. . . . "

This section might be made to apply and probably does apply to commission forms of government, though the commission form of government would seem to have to act under Section 2655 of the Code of 1930 in order to abandon that form of government. The powers given by these sections of the code are somewhat in line with what is known as "home rule laws."[6] Amendments will be

[5]Further classifications are found in the fact that municipalities of 5,000 inhabitants or more may purchase light plants, and that municipalities of over 20,000 are expressly omitted from the provisions of § 2455 of the Code of 1930 authorizing municipalities, if they so desired, to sell or lease public utility plants.

[6]*Cf.* MISS. CODE ANN. (1930) § 2625. Adams v. Kuykendall, 83 Miss. 571, 35 So. 830 (1903); O'Flynn v. McInnis, 80 Miss. 125, 31 So. 584 (1902); Yazoo City v. Lightcap, 82 Miss. 148, 33 So. 949 (1903); *Ex parte* Dixon, 89 Miss. 778, 42 So. 233 (1906); Love v. Holmes, 91 Miss. 535, 44 So. 835 (1907); Monette v. State, 91 Miss. 662, 44 So. 989 (1907); Williams v. Vicksburg, 116 Miss. 79, 76 So. 838 (1917).

permitted even though they conflict with the code chapter provided they do not conflict with the constitution. It may be that by such amendments municipal corporations may operate uniformly even as to content.

Municipalities are the creatures of the state, and therefore the legislature may create, modify, or abolish the charter of any municipal corporation. A study of the laws and acts of the legislature of recent years will indicate that the legislative acts relate to all municipalities regardless of class or form. For example, it has been provided that "the governing body of all towns, cities, and villages is hereby authorized and required to refund erroneously paid privilege tax or ad valorem taxes paid such towns, cities, or villages."[7] This is a very good act but it ignores all distinctions made in the government as to class or powers. It applies to all municipalities whether under private-charter, code-charter, or commission government; and no distinction between them is attempted.

There are numerous laws of this kind. Thus, Chapter 317 of the Laws of 1934 gives certain powers to municipalities and defines the term "municipality" as including "any incorporated city, town, or village of the state of Mississippi, whether operated under special charter or under the general law of the State of Mississippi governing municipalities, or whether operating under the commission form of government." Chapter 258 of the Laws of 1936 provides that "any municipality in this state acting by the governing authorities, . . . " thus amending all charters. Chapter 160 of the Laws of 1936 reads: "any municipality in the state of Mississippi, whether operating under special charter or not, may impose a tax on all privileges. . . . " This also applies to all charter forms and gives power to code-charter, commission-government, and private-charter municipalities. By using the word "municipality," cities, towns, and villages are included—this notwithstanding the fact that the code[8] provides that only cities and towns may levy and collect the privilege license. It will thus be seen that the legislature in recent amendments has not taken into consideration the classification in the code and the amendments apply regardless of the form of charter or whether it be city, town, or village. Being general laws, they would control as against special acts. Perhaps many municipalities with private charters are unaware of the fact that their charter has been amended.

In 1908, provision was made for the commission form of government by the legislature.[9] This law is not re-enacted in the Code

[7]Miss. Laws 1926, c. 273.
[8]Miss. Code Ann. (1930) § 2445.
[9]Miss. Laws 1908, c. 108.

of 1930, but municipalities organized with this type of government have power to continue to exercise all the rights, powers, privileges and immunities granted by that act. In 1912, another act providing for the commission form of government was enacted.[10] Thus we had two commission forms of government, or two classes, and it was contended that this was forbidden by Section 88 of the Constitution. But it was decided that the act of 1912 was not unconstitutional in the case of *City of Jackson v. State*,[11] the court holding that the laws were general as to class. This at once multiplied the different forms of charters. Section 2639 of the Code of 1930, relating to commission government, provides:

> "Except as limited herein, the council shall have, exercise and perform all executive, legislative and judicial powers, duties, and obligations exercised or performed by the mayor and board of aldermen, or mayor and boards of aldermen and councilmen, and all other officers, commissioners, trustees, boards or other body whatever, acting for the city at the time of the adoption by such city of the commission form of government."

The code provided for three forms of charters—Private Charter, Code Charter, and Commission-Government Charter. There are several additional forms of charters. For example, under Section 2639, Jackson retains its code-charter powers which were not inconsistent with the commission government. Meridian has the commission form in relation to its private charter. Vicksburg adopted the commission form of electing all officers from the city at large and making each one head of a separate department of the municipality, but it retains its private charter. Gulfport, operating under the commission form of government allowed by the Laws of 1908, with its code charter is a type of another classification. It is not to be understood that the naming of the municipal corporations by the code is challenged or disregarded, but we do not have distinctions. Jackson, Meridian, and Gulfport certainly have different forms of charters though classified as commission form. It will be seen that in Mississippi, with the powers and authority conferred, we have the following with different laws: (1) code-charter,[12] (2)

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[10]Miss. Laws 1912, c. 220.

[11]102 Miss. 663, 59 So. 873 (1912).

[12]Municipalities having the code charter are: Ashland, Ackerman, Amory, Baldwyn, Batesville, Bay Springs, Belzoni, Booneville, Brandon, Brookhaven, Bude, Calhoun City, Canton, Carrollton, Centreville, Charleston, Cleveland, Coffeeville, Collins, Columbia, Crystal Springs, Decatur, DeKalb, Drew, Durant, Electric Mills, Ellisville, Eupora, Fayette, Friars Point, Gloster, Hollandale, Holly Springs, Hazlehurst, Hernando, Houston, Itta Bena, Iuka, Kosciusko, Leakesville, Leland, Lexington, Liberty, Long Beach, Louisville, Lumberton, Lucedale, Macon, Magnolia, Marks, Mayersville, Mendenhall, Monticello, Moorhead, Moss Point, Norfield, New Albany, Newton, Pass Christian,

private-charter,[13] (3) commission government,[14] (4) commission government of 1912 and code-charter,[15] (5) commission government of 1912 and private-charter,[16] (6) commission government of 1908 and code-charter,[17] (7) private-charter and election of three commissioners at large to act as heads of departments.[18] Thus we reach a total of seven types of municipalities differing as to the content of their charter.

That a revision or re-arrangement of the code chapters on municipal corporations is desirable can be seen from the foregoing. Other instances which show the need of a revision may be cited. Section 2409 of the Code of 1930 provides:

> " . . . . an indebtedness shall not be incurred nor a warrant be drawn on the treasurer in payment of any indebtedness to exceed the amount of funds on hand in the treasury at the time, except as specially authorized in the issuance of bonds."

Section 5979 reads:

> "No warrant shall be issued or indebtedness incurred by any county or municipality unless there is sufficient money in the particular fund from which the allowance is or must be made, to pay such warrant or indebtedness."

This may be a quibble, but Section 2409 leaves it open for the municipal authorities to issue warrants so long as there is money in the treasury while the other section restricts them as to the amount in the fund. The sections were passed and incorporated in the code at the same time. Section 2592, which relates to finance statements, provides that they should be published and adds, among other things: "In case of an increase of indebtedness not so authorized, the mayor and aldermen shall not succeed themselves or each other." As the constitution provides that qualified electors and no others may hold office, this part of that section has been

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Pelahatchie, Picayune, Pittsboro, Pontotoc, Poplarville, Prentiss, Purvis, Quitman, Raleigh, Raymond, Ripley, Ruleville, Sardis, Senatobia, Shaw, Starkville, Sumner, Tunica, Tupelo, Tylertown, Union, Vaiden, Water Valley, Walthall, Waynesboro, Wiggins, and Winona.

[13]Municipalities having a private charter are: Aberdeen, Carthage, Columbus, Corinth, Forest, Fulton, Greenville, Grenada, Indianola, Meadville, Natchez, Ocean Springs, Okolona, Oxford, Paulding, Philadelphia, Port Gibson, Rolling Fork, Rosedale, Shelby, Summit, West Point, Woodville, and Yazoo City.

[14]The following cities have a commission government: Bay St. Louis, Biloxi, Clarksdale, Greenwood, Hattiesburg, Laurel, McComb, and Pascagoula.

[15]Jackson has a commission government of 1912 and a code charter.

[16]Meridian has a commission government of 1912 and a private charter.

[17]Gulfport has a commission government of 1908 and a code charter.

[18]Vicksburg has a private charter with an election of three commissioners at large to act as heads of departments.

held void under *McCool v. State.*[19] Section 2616 provides that municipal authorities shall not be interested in municipal contracts and is made to apply to cities of over 4,000 where sales and purchases are made. The Supreme Court, in the case of *Noxubee County Hardware Co. v. City of Macon,*[20] questioned whether the distinction made in this section is constitutional. Since the cause of action had arisen before the passage of the section, however, the court made no pronouncement on the matter. If the section is valid it provides still another basis of classification.

The only purpose of this article is to give the present status of the laws relating to municipal corporations and to classify the municipalities according to charter. This survey[21] includes ninety-two municipal corporations with a population of more than 1,000 according to the census of 1930 and all county sites regardless of population. As to the advisability of amendments or changes in charters, no opinion is expressed. But the classification here set forth will also be usable by the municipalities in determining what are their powers and whether their charters should be amended by enlargements or restrictions of those powers.

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[19]149 Miss. 82, 115 So. 121 (1928).
[20]90 Miss. 636, 43 So. 304 (1907).
[21]See notes 12-18, *supra.*

UNEMPLOYMENT COMPENSATION

*Leon L. Wheeless**

General

The beginning of a new era in social legislation within the United States of America was marked by the passage by Congress of the Social Security Act[1] during the year 1935. This Act consists of eleven different titles,[2] and covers three major branches of social security, namely: public assistance, old age benefits and unemployment compensation. It is the purpose of this discussion to cover the last of these, and to give in brief outline the provisions both of the Social Security Act and of the Mississippi Unemployment Compensation Law, and their relation to the unemployed worker of this state.

While much has been said concerning the constitutionality of the Social Security Act and the various state unemployment compensation laws, no attempt will be made in this discussion to enter into any of the arguments raised by this question. Nor will any attempt be made to deal with any of the economic factors which underly these laws. It is merely hoped that a clearer conception of the purposes and workings of unemployment compensation may be had by the reader.

The basic principle underlying unemployment compensation, briefly stated, is that a method shall be provided whereby funds may be systematically accumulated during periods of employment in order to provide benefits for periods of unemployment. This principle, together with a full statement of the public policy of the State of Mississippi as regards unemployment, is set forth in Section 2(a) of the Mississippi Law in the following language:

> "Sec. 2(a). As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legisla-

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*Chairman, Mississippi Unemployment Compensation Commission.

[1] 49 STAT. 620, 42 U. S. C. A. c. 7 (1935).

[2] The titles are: I—Grants to States for Old-Age Assistance; II—Federal Old-Age Benefits; III—Grants to States for Unemployment Compensation Administration; IV—Grants to States for Aid to Dependent Children; V—Grants to States for Maternal and Child Welfare; VI—Public Health Work; VII—Social Security Board; VIII—Taxes with Respect to Employment; IX—Tax on Employers of Eight or More; X—Grants to States for Aid to the Blind; XI—General Provisions.

> ture to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

It seems that the first use of the principle of unemployment compensation on a voluntary basis was made in France, about the year 1795, by members of trade unions. These members voluntarily contributed a portion of their weekly earnings to a fund for the purpose of paying benefits to themselves and fellow workers during times of unemployment. This voluntary system gradually spread with the trade union movement.

The first National Unemployment Act on a compulsory basis was enacted in Great Britain in 1911. This law required contributions from employers, employees and the Government. At the present time about seventeen nations in Europe[3] have adopted unemployment insurance laws on either a voluntary or a compulsory basis,[4] and approximately 46,000,000 wage earners in the world are afforded the protection of such legislation.

The existence of forty-eight states in this country has had a deterring effect on the efforts to enact similar legislation in the United States. By levying taxes, or contributions, against its employers a state felt that it was placing them at somewhat of a disadvantage in competition with employers of other states. And yet, in spite of this fact, the State of Wisconsin enacted such a law in 1932,[5] and is now paying benefits to its eligible unemployed workers.

In order to overcome this fear on the part of the states that

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[3]Austria, Bulgaria, Germany, Great Britain, Irish Free State, Italy, Poland, Queens Land (Australia), Belgium, Czechoslovakia, Denmark, Finland, France, Netherlands, Norway, Spain and Switzerland.

[4]Report of the Select Committee to Investigate Unemployment Insurance. SEN. REP. No. 964, 72nd Cong. (1933).

[5]WIS. STAT. c. 108.

such legislation would be discriminatory as regards their employers, Congress, in the Social Security Act, has adopted the tax-offset method to encourage the states in passing unemployment compensation laws. This feature is contained in Title IX of the said Act,[6] and provides for a credit against the excise tax levied therein of all amounts paid by an employer as contributions to the Unemployment Compensation Fund of a state with an approved law, up to ninety per cent of this excise tax. The result of this action on the part of the Congress has been that to December 24, 1936, twenty-nine states[7] and the District of Columbia had unemployment compensation laws on their statute books which had been approved by the Social Security Board, and other state legislatures were being called into extraordinary sessions for the purpose of considering such legislation.

The Social Security Act

In order that we may have a clearer understanding of the provisions of the Mississippi Unemployment Compensation Law, and of its workings, it is well that we consider briefly those titles of the Social Security Act which deal directly or indirectly with unemployment compensation. It should be borne in mind that Congress, in the Social Security Act, did not enact an unemployment compensation law, and that no provision is made therein for the collection of any funds for unemployment compensation purposes, nor for the payment of any benefits to eligible workers. All that the Social Security Act does is to levy an excise tax against certain employers, against which tax these employers may credit their contributions to state unemployment compensation laws, and to provide for grants in aid to states with approved unemployment compensation laws for the administration of these laws. The provisions of the two titles of this Act dealing with these two features will now be discussed.

Title IX

Title IX of the Social Security Act levies an excise tax against employers who on at least twenty different days in a year, each day being in a different week, have in their employ eight or more persons, the excise tax being equal to the following rates: for the year 1936 one per cent; for the year 1937 two per cent; and thereafter three per cent. This tax is levied against all types of employment except the following: Agricultural labor; domestic service in a private home; service as an officer or member of the crew of a

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[6] 42 U. S. C. A. § 902 (1935).

[7] Alabama, Arizona, California, Colorado, Connecticut, Idaho, Indiana, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin.

vessel on the navigable waters of the United States; service by an individual in the employ of his son, daughter or spouse, and service by a minor child in the employ of his father or mother; service in the employ of the Federal Government or its agencies or instrumentalities, and of the states or their agencies or instrumentalities; and service in the employ of a non-profit organization operated exclusively for religious, charitable, scientific, literary, or educational purposes.

The above tax is collected annually by the Bureau of Internal Revenue, and is due on or before January 31st of the year following the year in which it accrues. Against this tax the credit mentioned above is permitted. In order to secure this credit, however, the contributions must have been made under the provisions of an unemployment compensation law approved by the Social Security Board. In order to secure the approval of the Board, the said law must provide the following:

(1) All compensation is to be paid through public employment offices in the State or such other agencies as the Board may approve;

(2) No compensation shall be payable with respect to any day of unemployment occurring within two years after the first day of the first period with respect to which contributions are required;

(3) All money received in the unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by Section 904;

(4) All money withdrawn from the Unemployment Trust Fund by the State agency shall be used solely in the payment of compensation, exclusive of expenses of administration;

(5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (b) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any *bona fide* labor organization;

(6) All the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time.

The Board shall, upon approving such law, notify the Governor of the State of its approval.

This excise tax, levied under the provisions of the above mentioned title of the Social Security Act, accrues against those employers in a state who are subject thereto, regardless of whether that state has an unemployment compensation law or not. Those individuals in Mississippi who have employed the minimum number of eight employees for the required length of time during the year 1936 are subject to that tax provision, and would be forced to pay the tax of one per cent on their pay rolls for the year, even though the Mississippi Legislature had not passed the Unemployment Compensation Law. The result of this is that so long as a state does not levy a contribution rate for unemployment compensation purposes in excess of ninety per cent of the Federal excise tax rate, it subjects its employers to no additional burden insofar as taxes are concerned.

Title IX also makes provision for the establishment in the Treasury of the United States of a trust fund to be known as the "Unemployment Trust Fund." All monies collected by state agencies must be deposited in this fund, where they remain to the credit of the state making the deposit, until withdrawn by that state for the payment of benefits under its unemployment compensation law. These funds bear interest at a rate equal to the average rate of interest, computed as of the end of the calendar month next preceding the date of issue, borne by all interest-bearing obligations of the United States then forming part of the public debt.

Title III

Title III of the Social Security Act, as noted above, deals with grants to states for the administration of their unemployment compensation laws. The Congress, in this title, makes an annual appropriation of the sum of $49,000,000 to be used as therein provided. The Social Security Board requires the submission by the states of quarterly budgets, which shall contain an itemized statement of the amount estimated to be necessary for the proper administration of the state law during the succeeding three months. Upon the approval of this budget, the Board certifies to the Secretary of the Treasury for payment to the state such amount as is found to be necessary for the proper administration of the said law.

This title of the Social Security Act provides that the Board shall make no certificate for payment to any state unless it finds that the law of that state, approved by the Board under Title IX, includes provisions for:

(1) Such methods of administration (other than those relating to selection, tenure of office, and compensation of personnel)

as are found by the Board to be reasonably calculated to insure full payment of unemployment compensation when due; and

(2) Payment of unemployment compensation solely through public employment offices in the State or such other agencies as the Board may approve; and

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and

(4) The payment of all money received in the unemployment fund of such State, immediately upon such receipt, to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by Section 904; and

(5) Expenditure of all money requisitioned by the State agency from the Unemployment Trust Fund, in the payment of unemployment compensation, exclusive of expenses of administration; and

(6) The making of such reports, in such form and containing such information, as the Board may from time to time require, and compliance with such provisions as the Board may from time to time find necessary to assure the correctness and verification of such reports; and

(7) Making available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation, and a statement of such recipient's right to further compensation under such law.

Mississippi Unemployment Compensation Law

Having now considered the two titles of the Social Security Act which bear upon unemployment compensation, we shall discuss briefly the Mississippi Unemployment Compensation Law, both as to the method by which funds are raised for the payment of benefits to eligible unemployed, and as to the procedure to be followed in making these payments available to those persons entitled thereto.

The Mississippi Unemployment Compensation Law was passed by the Mississippi Legislature at its regular session in 1936,[8] and was signed by the Governor on March 23rd. Certain sections of the law were amended at the first extraordinary session of the legislature which convened in the month of September,[9] and these amend-

[8]Miss. Laws 1936, c. 176.
[9]Miss. Laws Ex. Sess. 1936, c. 3 (H. B. No. 10).

ments will be considered in this discussion. The Mississippi Law was approved by the Social Security Board on May 20th, and the three-member Commission was appointed on May 25th. The actual work of setting up an organization was begun on June 1st.

Contributions

Funds for the payment of benefits are raised by means of a contribution rate which is levied against employers in the State of Mississippi. Section 7 of the Law, which is the section providing for these contributions, reads as follows:

> "Sec. 7. (a) Payment. (1) On and after April 1, 1936, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages payable for employment (as defined in Section 19(g)) occurring during such calendar year, except that for the nine months period beginning April 1, 1936, such contributions shall accrue and become payable with respect to wages payable for employment during the nine consecutive calendar months beginning April 1, 1936. Such contributions shall become due and be paid to the Commission at such times and in such manner as the Commission may prescribe, and shall not be deducted, in whole or in part, from the wages of individuals in his employ.
>
> "(2) In the payment of any contributions, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.
>
> "(b) Rate of contribution. Each employer shall pay contributions equal to the following percentages of wages payable by him with respect to employment:
>
> "(1) One and two-tenths per centum with respect to employment for the nine months period beginning April 1, 1936, provided that if the total of such contributions at such one and two-tenths per centum rate equals less than nine-tenths of one per centum of the annual pay roll of any employer for the calendar year 1936, such employer shall pay, not later than January 15, 1937, an additional lump sum contribution with respect to employment for such nine months period beginning April 1, 1936, equal to the difference between nine-tenths of one per centum of his annual pay roll for the calendar year 1936 and the total of his contributions at such one and two-tenths per centum rate for such nine months period beginning April 1, 1936;

"(2) One and eight-tenths per centum with respect to employment during the calendar year 1937;

"(3) Two and seven-tenths per centum with respect to employment thereafter.

"(c) Future rates based on benefit experience. The Commission shall maintain a separate account for each employer, crediting his account with all the contributions which he has paid on his own behalf during each calendar year, and charging his account with all amounts paid within such year as benefits which, under Section 3 of this act, were charged against weeks of employment in his service. But nothing in this act shall be construed to grant any employer or his employees prior claims or rights to the amount paid by him to the unemployment compensation fund either on his own behalf or on behalf of his employees. All contributions to the fund shall be pooled and available to pay benefits to any employee entitled thereto under this act irrespective of the source of such contributions. The Commission shall make a study of the problems of classifying employers in accordance with their actual experience in the payment of contributions on their own behalf and with respect to benefits charged against their accounts, with a view to reporting to the legislature the advisability of fixing such contribution rates as will reflect such experience. It shall also make study and report with respect to seasonal industries."

In order to understand this section more fully it is well to set out here the definitions of certain words included therein. These definitions are taken from Section 19 of the Mississippi Law, and the pertinent sub-sections thereof provide:

"(d) 'Contributions' means the money payments to the State Unemployment Compensation Fund, required by this act.

"(f) 'Employer' means: (1) Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, eight or more individuals (irrespective of whether the same individuals are or were employed in each such day);

"(2) Any employing unit which acquired its organization, trade or business, or substantially all the assets

thereof from another which at the time of such acquisition was an employer subject to this act;

"(3) Any employing unit which acquired its organization, trade or business, or substantially all the assets thereof from another employing unit and which, if treated as a single unit with such other employing unit would be an employer under paragraph (1) of this sub-section;

"(4) Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforcible means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforcible means or otherwise), and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this sub-section;

"(5) Any employing unit which, having become an employer under paragraph (1), (2), (3), or (4), has not, under Section 8, ceased to be an employer subject to this act; or

"(6) For the effective period of its election pursuant to Section 8(c) any other employing unit which has elected to become fully subject to this act.

"(g) 'Employment' means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied, which service (I) is performed in this state by an individual, exclusive, however, of any service within this state which is incidental to the individual's service performed elsewhere; or (II) is performed elsewhere but is incidental to an individual's service in this state; but the term shall not include:

"(1) Service performed in the employ of this state, or of any political sub-division thereof, or of any instrumentality of this state or its political sub-divisions;

"(2) Service performed in the employ of any other state or its political sub-divisions, or of the United States Government, or of an instrumentality of any other state or states or their political sub-divisions or of the United States;

"(3) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an Act of Congress, provided

that the Commission is hereby authorized and directed to enter into agreements with the proper agencies under such Act of Congress, which agreements shall become effective ten days after publication thereof in the manner provided in Section 11(b) of this act for general commission rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this act, acquired rights to unemployment compensation under such Act of Congress, or who have, after acquiring potential rights to unemployment compensation under such Act of Congress, acquired rights to benefits under this Act;

"(4) Agricultural labor;

"(5) Domestic service in a private home;

"(6) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

"(7) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

"(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

"(n) 'Wages' means all remuneration payable for personal services, including commissions and bonuses and the cash value of all remuneration payable in any medium other than cash. The reasonable cash value of remuneration payable in any medium other than cash, and the reasonable average amount of gratuities, shall be estimated in accordance with rules prescribed by the Commission."

From the above sections of the Mississippi Law it will be seen that that law covers employers of eight or more individuals, just as Title IX of the Social Security Act does. In order to determine who is an employer within the meaning of the Act, the Commission may look beyond the individual or firm making a report and see whether or not that firm (1) acquired its organization, trade, etc., from another which was at that time an employer subject to the

act; or, (2) acquired its said organization, trade, etc., from another employing unit which, if treated as a single unit with the purchaser would be an employer subject to the act; or, (3) is a unit which owns or controls certain other units, or is a unit controlled by some other unit, and would be an employer subject to the act if considered together with such other unit or units. In all these cases the Commission may, under the Law, consider together one or more employing units in order to determine liability as an employer. These provisions are designed primarily to prevent the splitting up of a firm into smaller units for the purpose of avoiding coverage under the Unemployment Compensation Law.

Employers pay a contribution rate figured at one and two-tenths per cent of their pay rolls for the last nine months of this year, which means that the rate should average nine-tenths of one per cent of their pay rolls for the entire year. The rates for 1937 and thereafter are also nine-tenths of the Federal excise tax rate. Mississippi employers should therefore be able to obtain full credit against their Federal tax for all amounts paid under the provisions of the Mississippi Unemployment Compensation Law. This is especially true when we consider the fact that the types of exempted employment under the Mississippi Law and under Title IX of the Social Security Act are the same. In determining the amount of their pay rolls employers must take into consideration all remuneration payable for personal services, whether same is paid in cash or not.

An employer, not otherwise subject to the Mississippi Law, may, with the approval of the Commission, elect to come under its terms, and thus provide its protection for his employees.[10]

The Mississippi Commission has been primarily engaged in the collection of contributions since it began its work on June 1, 1936. About $600,000 will be collected in the State of Mississippi by January 15, 1937. This figure will be approximately doubled for the year 1937, and trebled for each year thereafter. This money, as provided by Title IX of the Social Security Act, is being deposited by the Mississippi Commission in the United States Treasury, where it remains to the credit of the State of Mississippi and draws interest at a rate between two and three per cent. All of this fund, together with the accrued interest thereon, will be available to the Commission for the payment of benefits to eligible unemployed people in the State of Mississippi after April 1, 1938.

It is well to note here that no part of the funds collected by the Commission from Mississippi employers can be used to pay any

[10]Miss. Laws 1936, c. 176, § 8, as amended by Miss. Laws Ex. Sess. 1936, c. 3 (H. B. No. 10).

part of the administrative costs connected with this work. Every penny collected in this way must be used for no other purpose than the payment of the benefits provided by the Act. All costs connected with the administration of the Unemployment Compensation Law are provided by the Federal Government, out of funds appropriated for that purpose by the Congress.

Benefits

The ultimate purpose of all unemployment compensation laws is, of course, the payment of benefits. That is the most important feature of the Mississippi Law, and the one requiring the greatest consideration in this study. In order that the reader hereof may have a clearer understanding of this entire subject of benefit payments, it is proposed to divide the subject into four subordinate headings, and to consider each one separately.

1. Payments—When and Where Made

Section 3(a) of the law provides that benefits shall become payable from the Fund to an unemployed and eligible individual twenty-four months after the date when contributions first accrue under the act from any employer subject thereto. In view of the fact that contributions began to accrue on April 1, 1936, this means that no benefits are payable until April 1, 1938.

The same Section 3(a) provides that "all benefits shall be paid through the employment offices, at such times and in such manner as the Commission may prescribe."

The employment offices above referred to are those which the Commission is required to set up throughout the State, at accessible points. These offices must be set up and functioning by April 1, 1938, in order that individuals claiming benefits may register thereat, both to claim benefit payments and to secure any employment which may be available. A more detailed discussion of this matter will be given in a subsequent heading.[11]

As will be seen by reference to Section 7(c), above quoted, Mississippi operates under the pooled-fund system, rather than an employer-reserve plan. This means that all contributions which are collected are placed into one Fund, and that from this fund any eligible individual may draw benefits, regardless of the amount his employer or employers may have therein to their credit. It is further provided, however, that a separate account be kept for each employer, in which the Commission will credit the said employer with all amounts paid by him into the Fund, and charge him with all amounts paid as benefits which may properly be charged against

[11]See Eligibility for Benefit Payment, p. 333, *infra*.

weeks of employment in his service. This latter procedure will be explained in a subsequent section of this discussion.[12]

The purpose of this separate account for each employer is to permit the Commission to make a study of his record, based upon the contributions made to the Fund and the benefits paid by reason of unemployment in his particular business or establishment. From the results of such study the Commission may recommend to the Legislature the advisability of raising or lowering the rates of certain individuals.

2. Eligibility for Benefit Payments

Section 4 of the Mississippi Law provides in detail the conditions which will make an individual eligible to receive benefits under the act. That Section, in full, reads as follows:

> "Sec. 4. An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found by the Commission that:
>
> "(a) He has made a claim for benefits in accordance with the provisions of Section 6(a) of this act.
>
> "(b) He has registered for work at the employment office designated by the Commission within such time limits and with such frequency and in such manner (such as in person or in writing) as the Commission may by general rule prescribe, provided that failure to comply with this condition may be excused by the Commission upon a showing of good cause therefor.
>
> "(c) He is physically and mentally able to work.
>
> "(d) Prior to any week for which he claims benefits for total unemployment, he has been totally unemployed for a waiting period of at least two weeks with respect to which he received no benefits but during which he was eligible for benefits in all other respects, except for the requirements of sub-sections (a) and (e) of this section, and was not ineligible for benefits under any provision of Section 5 of this act. Such two weeks of total unemployment need not be consecutive, but shall be accumulated over the period of thirteen consecutive weeks preceding any week for which he claims benefits, provided that this requirement shall not interrupt the payment of benefits for consecutive weeks of total unemployment; and provided further that such two weeks of total unemployment occur after benefits first could become payable to any individual

[12]See Continuation of Benefits, p. 337, *infra*.

under this act, and after the unemployed individual has had at least one week of employment.

"(e) He has had at least thirteen weeks of employment within the fifty-two consecutive weeks preceding the close of his most recent week of employment."

Section 5 of the law sets forth in detail those things which will disqualify an individual for benefits. It provides:

"Sec. 5. An individual shall be ineligible for benefits:

"(a) For the week in which he has left work voluntarily without good cause, if so found by the Commission, and for not less than one nor more than five next following weeks, (in addition to the waiting period) as determined by the Commission according to the circumstances in each case.

"(b) For the week in which he has been discharged for misconduct, if so found by the Commission, and for such of the next following weeks which ensue before he again secures employment from an employer.

"(c) If the Commission finds that, being totally unemployed and otherwise eligible for benefits, he has failed, without good cause, either to apply for available, suitable work when so directed by the employment office of the Commission or to accept suitable work when offered him by the employment office or by an employer, or to return to his customary self-employment (if any) when so directed by the Commission. Such ineligibility shall continue for the week in which such failure occurred and for not less than one nor more than the five next following weeks (in addition to the waiting period) as determined by the Commission according to the circumstances in each case.

"(1) Work or self-employment shall be deemed suitable only if the Commission finds that it can reasonably be expected to yield the individual total wages greater than his weekly benefit amount. In determining whether or not any such work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training and experience, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

"(2) Notwithstanding any other provisions of this act, no employment shall be deemed suitable, and benefits

shall not be denied under this act to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (b) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

"(d) For any week in which it is found by the Commission that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he is or was last employed, provided that this section shall not apply if it is shown to the satisfaction of the Commission that:

"(1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

"(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute; and provided further that if in any case separate branches of work, which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall for the purposes of this sub-section be deemed to be a separate factory, establishment or other premises.

"(e) For any week with respect to which the individual is receiving or has received remuneration in the form of

"1. Wages in lieu of notice, or any payment by way of compensation for the loss of wages;

"2. Compensation for temporary partial disability under the workmen's compensation law of any state or under a similar law of the United States; or

"3. Old age benefits under Title II of the Social Security Act, as amended, provided that if such remuneration is less than the benefits which would otherwise be due

> under this act, he shall be entitled to receive for such week if otherwise eligible, benefits reduced by the amount of such remuneration."

A careful reading of the above quoted sections of the Mississippi Law will reveal clearly the fact that unemployment compensation is not in the nature of a pension or a dole to be handed out to those persons who can not and will not work. To receive his compensation an individual must have been employed at least thirteen weeks out of the preceding fifty-two weeks. He must undergo a waiting period of at least two weeks, during which time the employment office will attempt to secure additional employment for him. These efforts on the part of the employment office will continue even after the individual has begun to receive his benefit payments. During all this time he must be physically and mentally able to work, and must accept available, suitable work, within the prescribed limitations or lose his right to benefit payments.

It can be further noted that the waiting period is considerably increased for those individuals who either leave work without good cause, or are discharged for misconduct.

Section 6 of the law provides for the investigation of all claims by individuals for benefits, such investigation to be made by a representative or representatives of the Commission. Ample provision is made for review by special tribunals, by the Commission and by the courts of those cases in which there is a dispute, either by the claimant or by an employer who has paid contributions on his wages, as to the eligibility of such claimant for benefits under the act. The law further provides for drastic penalties on those persons who knowingly make false statements, either for the purpose of obtaining benefits or for the purpose of preventing anyone else from obtaining benefits.

3. Amount of Benefits

Section 3(b), and Section 3(c) provide the amounts which are payable as benefits both for total and partial unemployment.

> "Sec. 3(b) Weekly benefit amount for total unemployment. Each eligible individual who is totally unemployed (as defined in Section 19(1) in any week shall be paid, with respect to such week, benefits (computed to the next highest multiple of twenty cents) at the rate of fifty per centum of his full-time weekly wages (as defined in subsection (f) of this section) but not more than $15.00 per week.

"Sec. 3(c). Weekly benefit for partial unemployment. Each eligible individual who is partially unemployed (as defined in Section 19 (j)), in any week shall be paid a partial benefit. Such partial benefit shall be an amount (computed to the next highest multiple of twenty cents) equal to the difference between his weekly benefit amount (as defined in Section 19(q)) and five-sixths of his wages (as defined in Section 19(n)) for such week."

The definitions of total and partial unemployment are found in Section 19(j) and 19(1), as follows:

"Sec. 19(j). 'Partial unemployment.' An individual shall be deemed 'partially unemployed' in any week if his wages payable for such week fail to exceed 120 per centum of the weekly benefit amount he would be entitled to receive if totally unemployed and eligible.

"Sec. 19(1). 'Total Unemployment.' An individual shall be deemed 'totally unemployed' in any calendar week with respect to which no wages are payable to him."

In order to determine the full-time weekly wage of an individual (as required under Section 3(b) above) the Commission must have reports from employers at the time they pay their contributions as to the full-time hours of the individual reported on, the rate of pay, and the hours actually worked during the pay roll period by that individual. The full-time weekly wage of an individual is then determined by the Commission from the data above collected. Roughly speaking, a man's full-time weekly wage is the average wage he has earned per week during the year immediately preceding the week in which he becomes unemployed. Thus, an individual who has earned $30.00 per week for twenty weeks, and $20.00 per week for twenty weeks, both rates being within the required year, would have a full-time weekly wage of the average between these two amounts. To calculate his benefit payments for total unemployment, this amount would be divided by two, and the figure thus arrived at would constitute the benefit payment for this individual and would be the amount paid by the Commission to him from the funds set up for that purpose. It can, in no instance, exceed $15.00 per week. Checks for this amount would be paid to the individual, so long as eligible, through the employment office at which this individual was registered.

4. Continuation of Benefits

So long as an individual remains eligible under the provisions quoted above, he would be entitled to draw benefit payments, if no further limit was placed upon his right to do so by the law. This

would mean than an eligible individual, so long as he could fulfill the requirements of the law, and could not find additional employment, might continue to draw benefit payments during the remainder of his life. Such is not permitted under the terms of the Mississippi Unemployment Compensation Law, however, for a definite limitation is placed upon the length of time during which he may draw such payments. This limitation is set forth in Section 3(e) of the law, as follows:

> "Sec. 3(e). Ratio provisions and duration of benefits. Benefits shall be paid each unemployed and eligible individual, with respect to his total or partial unemployment occurring within any period of fifty-two consecutive weeks:
>
> "(1) In the ratio of one-fourth of his weekly benefit amount to each uncharged week of employment occurring within the one hundred and four consecutive weeks preceding the close of his most recent week of employment, except that his aggregate benefits thus payable shall not exceed twelve times his weekly benefit amount; and thereafter
>
> "(2) In the ratio of one-twentieth of his weekly benefit amount to each uncharged week of employment occurring within the two hundred and sixty consecutive weeks preceding the close of his most recent week of employment."

A perusal of the above quoted section will likely convince the reader that it is more complicated than enlightening. However, the following explanation will reveal how it works in actual practice.

As stated above the Commission requires from each employer at the time he pays his contributions a report. From the information contained on this report the Commission sets up in its offices an individual record card on each employee reported by that employer. On this card is currently posted the weeks of employment which this employee has had, together with the other pertinent information. When this individual applies for a benefit payment, this card is examined to determine his eligibility. Upon it is shown the number of weeks of work which that individual has had since April 1, 1936, together with the registration number of the employer for whom each week of work was performed. Whenever the Commission makes a benefit payment to this individual it charges off or checks off four of the weeks of employment shown to his credit upon this card. So long as he is otherwise eligible the

individual may continue to receive benefit payments until each week of employment has been checked off on his card. If, however, he receives twelve benefit payments on the basis of employment for the two years preceding his most recent week of employment, and there are still certain weeks of employment left to his credit upon this card, the Commission will charge off twenty of the remaining weeks for each week in which it pays benefits to him. No record is kept for weeks of employment before April 1, 1936, and no record will be kept for more than five years prior to the date on which an individual becomes unemployed in the future.

The above explanation makes it clear that an individual's right to benefits is determined not only by the fact that he is willing and able to work, but that the length of time for which he will receive benefit payments is determined by how much he has worked during the two or five years preceding the time at which he claims benefits.

As heretofore stated, benefit payments are charged against weeks of employment to the credit of the claimant. In no event can any one calendar week be chargeable as more than one week of employment. These benefits are charged against those weeks of employment against which benefits have not previously been charged, in the inverse chronological order in which such weeks occurred. Therefore, instead of beginning to check off weeks of employment first credited to the claimant, the Commission will begin this checking off process with the weeks of employment last shown on the card to his credit. If, during any one calendar week an individual has rendered services for more than one employer, his benefits are chargeable only against the week of employment for the employer by whom the plurality of his wages for such week was payable.

Since Mississippi is operating under the pooled-fund system, with all contributions available to pay benefits to eligible unemployed, the only reason for this procedure of charging certain employers with these unemployment periods is to enable the Commission to make a study of the trends of unemployment, and all pertinent facts connected therewith. Under this system, the employer laying off an individual is charged with the responsibility, insofar as the record is concerned, for all benefit payments made to that individual. All this data may be used by the Commission in recommending a merit-rating system to the Legislature, under the terms of which those employers showing the greatest tendencies toward stabilizing employment, as reflected by the small number of benefits charged against weeks of employment in their service, may have their contribution rates correspondingly lowered. It is hoped that the result of the whole program of Unemployment Com-

pensation will be the stabilization of employment, so that the worker may have a reasonable assurance that he will not be discharged after a long period of faithful and efficient service to his employer, merely because it may result in some temporary financial saving to that individual. If this can be accomplished, unemployment compensation will have gone a long way toward achieving its objective. Until it is accomplished, the benefits payable thereunder will at least serve to maintain the unemployed worker and his family for a sufficient period of time to enable him to secure additional employment, without being forced upon private charity or public relief rolls.

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NOTE: The names and addresses of all other officers and members of the MISSISSIPPI STATE BAR ASSOCIATION are contained in the October, 1936 issue of the JOURNAL.

STATE BAR SECTION

Prospective Work for the Junior Bar

*Hugh N. Clayton**

The Junior Bar Section of the Mississippi State Bar was created at the Greenville convention last September. It is a subordinate organization of the State Bar and is composed of all members of the Mississippi Bar under the age of thirty-six years. Membership in the Junior Bar does not deprive one of his membership in the State Bar with all its rights and privileges.

Fortunately, also, there is no extra fee or charge on the members of the Junior Bar. This group was formed to provide an organization in which the younger members of the Bar might express themselves more freely and take the initiative on certain measures that affect them more vitally than they do the older men in the profession.

It is not the purpose of the Junior Bar to consolidate itself into a political unity with the purpose of seeking to influence the activities of the senior organization and no member of the Junior Bar is bound by the will of its majority in so far as his activities in the State Bar are concerned.

There was doubt on the part of some, spoken and unexpressed, at the Greenville meeting as to the wisdom of the Junior Bar, sincerely believing that it might alienate the younger element from the older and operate to create a division. This will not be so since it is planned to have the meeting of the Junior Bar on the evening prior to the regular annual convention and all members of the Bar will participate as usual in the main convention.

Since conflict and division will not, therefore, develop, those interested in the Junior Bar solicit the active cooperation and aid of all the lawyers in the State.

We are trying to bring before the Junior Bar itself at the coming Meridian meeting, prospective work that vitally affects the younger lawyers and which calls for constructive action. In order to allow the largest possible amount of freedom in the selection of these objectives, the Chairman asked the members of the Executive Committee to list three things we should work on.

We list them herewith and ask the members of the Junior Bar to consider them and then write the Chairman which of these objectives they believe we should devote our attention to at Meridian.

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*Chairman, Junior Bar Section; Member of the New Albany, Mississippi Bar.

The exact statements of the Committeemen are given under the several topics as follows:

Unauthorized Practice of Law

"I suggest that we work towards restricting the law practice by the Chancery Clerk in the preparation of deeds and other such matters; the passage of acts prohibiting banks and trust companies from acting as trustees, guardians, administrators, executors, etc.; restricting abstract companies solely to the preparation of abstracts . . . . It seems to me that everybody is cutting in on the lawyers. It occurs to me that adjustment companies are adjusting losses that might be adjusted by attorneys and the time is coming when more of the practice that should be done by attorneys will be assumed by other persons."

"I think it is unethical for lawyers who are on the directory of banks with trust departments to participate in the solicitation of trust business through a solicitor from people who have always had other lawyers. Through such solicitation and the wills secured thereby, such business lands in the lap of the bank's lawyers."

"Taking necessary steps to see that not only Circuit and Chancery Clerks not engage in the practice of law but also justices of the peace and bankers."

"Prohibiting banks, real estate firms, circuit and chancery clerks or other unlicensed persons from practicing law."

Civil Practice of District Attorneys

"The civil practice of district attorneys should be limited to chancery and federal courts. There has been a great deal of evil to arise out of the district attorneys through this section of the state by permitting them to practice law before circuit court juries where they handle criminal practice."

Consultation Fees

"It does not seem paradoxical to me, also, to suggest that lawyers well might charge fees for office consultation as physicians do. Most of our 'advice' is given free. And, the 'breath of an unfee'd lawyer' is of little value to him or his client."

Social Consciousness of the Bar

"I agree with you that the selection of objectives is of high importance and I think that the most important are those that tend to strengthen the social consciousness of the Bar."

Bar Dues Delinquents

"See if some pressure cannot be brought on the judiciary of the State to compel it to enforce the law prohibiting the practice of law in their courts by members of the profession who have failed to pay their dues."

Enforcing Ethical Standards

"I would suggest that the Bar Association, as a whole, designate some one particular man to be placed on a salary basis to investigate the conduct of lawyers thought to be unscrupulous and institute disbarment proceedings against such lawyers."

"I am especially interested in seeing the ethics of the Bar raised, also, the raising of the educational standards."

"Put some fire under the State Bar and see that they deal out fitting punishment to those members of the profession who violate the law. I think our State Bar is responsible for the number of shysters and quacks we have in the profession.

Change in Supreme Court Practice

"I suggest that we ask the Supreme Court to reverse themselves in holding that in the absence of a motion for a new trial they will not consider the sufficiency of the evidence to sustain it. This is a rule that certainly should be reversed."

County Courts

"I suggest that we work for legislation requiring each county in the state to have a county court and the abolition of the justice of the peace court."

This concludes the list of suggested topics. As one can see, some are controversal while others have merit in them that no one could dispute. The ideas and constructive criticism of all members of the Bar, particularly the Junior Bar, are earnestly solicited as applying to these topics or to others. We hope to list three subjects finally chosen for the Meridian meeting in the next issue of this Journal.

Let Us Go Forward—A Plea for Revision of Procedure and Practice in the Circuit Courts

*John M. Kuykendall**

The fact that the American Bar Association, cooperating with the Committee of the United States Supreme Court, is now engaged in working out a uniform plan for Civil Procedure in the Federal Courts calls to our minds the state of practice and procedure in the several circuit courts of this state, and that some concerted effort on the part of the bench and bar of the state could result in needed reform here. Revision of our practice and procedure would result in much saving of time, trouble and money, not only to the bench and bar, but to the litigating public and the taxpayers. With this in mind the writer has given some little thought to a few changes suggested by experience as a trial judge as well as a lawyer at the bar. We can simplify and speed up the disposition of business in the circuit court if we would have enacted a statute somewhat along the line set out in the Preliminary Draft of Rules as prepared by the Advisory Committee of the United States Supreme Court,[1] adjusting them to our system. We have labored long at "Rule Making Power of the Courts" and have found that we can not advance far in that direction; yet any concerted effort made by the circuit judges and the lawyers of the state would meet with approval in the legislature, and in this way we can travel.

Under our present law and practice we file a declaration in the office of the clerk,[2] a summons issues returnable to the first day of the next term of court,[3] and the defendant has all of the first day of that term in which to plead and until that day has passed the whole action lies dormant.[4] Our terms are usually spaced from three to six months apart. Until after the first day of the "next term" the plaintiff has no way of knowing what defendant will say, how he will plead, or what defense will be made. Until that time depositions can not intelligently be taken or the case prepared for trial. Why not provide that, upon the filing of the declaration, a summons with a copy of the declaration be served by the sheriff on each named defendant immediately and that return of the summons by the sheriff be made within ten days after its delivery to him by the clerk, with suitable penalty upon him for any failure in

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*Circuit Judge, 17th District, Charleston, Mississippi.

[1] *Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia*, prepared by the Advisory Committee on Rules for Civil Procedure, appointed by the Supreme Court of the United States. See also, Clark, *The Proposed Federal Rules of Civil Procedure* (1936) 22 A. B. A. J. 447.

[2] Miss. Code Ann. (1930) §§ 520-530.

[3] *Id.* § 2965 *ff.*

[4] *Id.* § 575.

that regard? The statute would provide that the first Monday of each month should be designated as "Imparlance Day" of the circuit courts of the state and all process should be made returnable either to the regular term or to the first imparlance day next succeeding the date of the filing of the declaration, and more than twenty days thereafter, and when process has been duly executed, the defendant shall plead or demur on or before the monthly imparlance day next succeeding that to which process is returnable, or if the process be returnable to a regular term of the court, the defendant shall plead or demur before noon of the first day of the term, as is provided in the Chancery Court Act.[5] The law should require the plaintiff to file with the clerk sufficient copies of the declaration for the service of a copy on each separate defendant, which copy would be served with the summons.

In this way issue will be joined, each advised as to the claim or defense of his adversary before the court convenes, and all depositions may be taken and the cause set down for trial when the court convenes.

We might adopt *in toto* Rule 14 of the Preliminary Draft of Civil Procedure:[6] "Complaint. The complaint (or if we prefer to follow old usage 'The Declaration') shall be sufficient if it contains (1) a short plain statement of the ground upon which the court's jurisdiction depends, (2) a short plain statement of the claim showing that the plaintiff is entitled to relief, and (3) a demand for the relief to which he deems himself entitled." To which might be added the present provisions of Section 521 of the 1930 Code, letting the following sections remain as they now are. We would do well to follow the suggestion as to pleading, but for the present too much by way of innovation would perhaps defeat any move for reform. We should develop our pleading into a system whereunder we would substitute for the present pleas used, which seldom disclose anything as to what the defendant will show, defense by way of answer, as set out in the "Preliminary Draft of Rules of Civil Procedure," and under this, "The answer, reply or other responsive pleading shall be sufficient if it sets out in short and plain terms the denial or matter in avoidance of each claim asserted in the pleading to which it is responsive."[7] In other words, let the defendant disclose his defense. Why require such disclosure by way of pleading in the chancery court and adopt another rule in the circuit court? The lawyer who appears in the circuit court is familiar with the chancery court procedure and can readily adapt himself to the same course in the court of law.

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[5] *Id.* § 375.
[6] Preliminary Draft of Civil Procedure, Rule 14.
[7] *Id.* Rule 15.

Due provision should be made for the disposition of preliminary motions, pleas in abatement, demurrers and the like,[8] to the end that on short notice these matters could be disposed of before the judge in vacation at convenient times and places to be fixed by the judge after consultation with the parties. To this end it should be provided that due notice should be timely given and the statute would provide for the setting down and hearing of these matters, provision being made that the clerk should arrange these hearings as to time and place.[9] The clerk can easily settle this with the attorneys and the judge. In most of the chancery court districts the chancellor, each Saturday, disposes of vacation matters, and it has generally come to be accepted that a vacation hearing can be had in any matter in the court. Why a different rule in the circuit court? The judge owes to the State his whole time and he can so arrange his schedule as to hear any matter at a convenient time and place. Provision should be made for the filing of replications and subsequent pleadings in short successive time until issue is finally joined.

By a study of the several sections of the Code having to do with practice and procedure in the circuit court,[10] and of the preliminary draft of rules of procedure in federal courts, having before us the statutes revising the practice and procedure in the chancery court,[11] the bench and the bar of the state can draw a bill embodying the changes needed and with but little trouble have this enacted into statute law.

The first cry will be, "Remove not the landmarks of the fathers." But, the experience of the lawyer in the chancery court under the changed system has proven that the change there was of great benefit. Who now would try a case in the chancery court on depositions? Or who would say, "Do away with Rule Day?" Who would ask that all cases in the chancery court be heard in term time? Compare the practice and procedure and check litigation in the last ten years and then ask, "Why the drift of important litigation from the circuit court to the chancery court?" What lawyer would not prefer trying an important case, other than a personal injury or damage case, in the chancery court rather than the circuit court?

There was a time when filing a suit in chancery meant long delay but not so now. The pleader can get to issue, the litigant get to trial, and the attorney get his case ended and fee collected with

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[8] *Id.* Rule 16.

[9] For present Chancery Court Procedure see MISS. CODE ANN. (1930) § 378.

[10] MISS. CODE ANN. (1930) §§ 520, 555, 575, 578, 579, 2965, and 2968.

[11] Miss. Laws 1924, c. 15; Miss. Laws 1926, c. 144; Miss. Laws, 1928, c. 232; Miss. Laws 1934, c. 252.

more definite speed and satisfaction in the chancery court than in the circuit court. Is this not due to the fact that there has been revision in the statutes having to do with that court and that, while time marches on, we still lag in the circuit court?

This is a paper written solely in the hope that some thought may be provoked among the members of our profession along the lines mentioned and that in some way the Mississippi Bar may work out a bill whereunder and whereby the practice and procedure of the circuit court can be put in step with the times.

In olden times when Moses, the great lawgiver, hesitated, "The Lord said unto Moses, why cryest thou unto me? Let the children of Israel go forward." And they did.

NOTES

The Statute of Limitations as Applied to Quasi Contracts in Mississippi

A confusion between contracts implied in fact and quasi contracts, sometimes called contracts implied in law, seems to persist in the minds of both judges and lawyers. Failure to distinguish the two types of obligation has led to interminable difficulties. In Mississippi not the least of these is the problem of determining which of the several statutory periods of limitation is applicable to bar a cause of action growing out of a contract implied solely in law. To appreciate the implications of the problem, an understanding of the distinction between the two types of obligation set forth above is necessary.

Genuine contracts fall under two classifications: first, express contracts—here the parties agree in specific language, and prescribe the terms of their bargain themselves, leaving nothing to inference or conjecture; second, contracts implied in fact—where the parties have shown an intent to bind each other by agreement, but have failed to prescribe their transaction in one or more of its essential particulars. Perhaps the transaction was a sale or a contract for service, but the parties neglected to state the exact price or compensation that would satisfy them. Perhaps even the intent to be bound contractually is not apparent from the words employed by the parties. But, if the court can gather from the circumstances of the transaction that such an intent was present in their minds, it will not hesitate to treat them as contracting parties. Both express contracts and those implied in fact are genuine agreements, for in both instances the court seeks to find an intention to be bound, and carries that intention into execution. In so doing it seeks always to make the wishes of the parties effective. The difference between the two classes of agreement lies solely in the type of evidence which is employed in discovering the bargain. When the bargain and its terms are manifest directly from the express statements of the contractors, the obligation is called an express contract. When the bargain and its terms must be found by resort to evidence of the circumstances in which the parties found themselves, the obligation is called a contract implied in fact. Essentially they cannot be otherwise distinguished from each other. In both, the court must find a willingness to be bound, and it must find this contracting intent from evidence which is naturally agreeable to such a conclusion.

On the other hand, it is unfortunate that contracts implied in law, or quasi contracts, should have ever been classified as contracts. They do not come into existence by virtue of any agree-

ment or any apparent willingness of the defendant to be bound. They arise quite independently of the wishes of the parties. In this respect they more nearly resemble torts than contracts.[1] They are of three types:[2] (1) Duties to pay money or give something of value arising by reason of a statutory provision, (2) obligations to pay judgments, (3) the duty to return a benefit which the defendant has received and which in good conscience he should not retain. This latter is the common law action to make restitution, and differs from a constructive trust only in respect to the tribunal in which it is enforced. Such obligations bear no similarity either to each other or to genuine contracts.[3] Their only characteristic in common is the fact that all three were originally enforced in the action of assumpsit, and this action also embraced modern contracts of the orthodox variety. When the term, assumpsit, was supplanted by the more modern word, contract, these adopted children inherited the new name. This error in nomenclature has produced unending confusion in the law.

When a statute provides that any action on a parol contract, "express or implied," shall be barred in three years did legislature intend to bar both contracts implied in fact and those wholly dissimilar contracts which are implied in law, or did it intend that contracts implied in law should be otherwise cared for? A short consideration of the historical background of the problem in Mississippi is enlightening.

Section 2151, Code of 1871, as amended by P. 252, Acts of 1876, provided:

> "All actions of debt, assumpsit, or on the case, founded upon any promissory note, bill of exchange, contract, or liability not under seal, express or implied, except actions founded upon open accounts, shall be commenced within six years next after the cause of such action accrued, and not after. All actions of debt or assumpsit, founded upon any open account, accounts stated, and verbal contracts, shall be commenced within three years next after the cause of action accrued, and not after."

By virtue of this statute actions on any contract or liability, expressed or implied were barred in six years, except agreements

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[1] WOODWARD, THE LAW OF QUASI CONTRACT (1913) § 5; KEENER, QUASI CONTRACTS (1926) 15.

[2] WOODWARD, *op. cit. supra* note 1, § 1; KEENER, *op. cit. supra* note 1, 16.

[3] Hertzog v. Hertzog, 29 Pa. 465 (1857); Columbus, H. V. & T. Ry. v. Gaffney, 65 Ohio St. 104, 113, 61 N. E. 152 (1901); Board of Highway Commissioners v. City of Bloomington, 253 Ill. 164, 170, 97 N. E. 280, Ann. Cas. 1913A, 471 (1912). See also Lewinsohn, *Contract distinguished from quasi contract* (1914) 2 CALIF. L. REV. 171; WOODWARD, *op. cit. supra* note 1, § 4; KEENER, *op. cit. supra* note 1, 6.

resting in parol. These were barred in three years. The first question to arise was whether an action to recover taxes paid under duress, a well-defined action in quasi-contract, was barred in six years or in three.[4] In holding that the six year period controlled, the court thereby read obligations implied by law into the six year portion of the statute and wholly confined the three year portion to obligations arising from parol contracts.[5]

This act was later repealed and superseded by Section 2739, Code of 1892, which is our present statute, appearing as Section 2299, Code of 1930:

> "Actions on open account or stated account not acknowledged in writing signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued, and not after."

The apparent intent of the legislature in the earlier statute was to subject actions on contracts generally, whether expressed or implied, to a six year period of limitation, and to except from this general classification certain enumerated obligations, including parol contracts. Whereas, in the present statute, the three year classification applicable to parol contracts expressly embraces implied contracts.

The first quasi contract action to be brought under the present statute involved a claim by an elected officer for his statutory salary.[6] The court held the action was barred at the end of three years. However, after several vacillating decisions[7] the court later

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[4]Musgrove v. Jackson, 59 Miss. 390 (1882). Note the later case of Blodgett v. Pearl River Co., 134 Miss. 816, 98 So. 227 (1923), where in the same type of action, the court again held the six year statute applicable, basing its decision however on the later doctrine "That in order for a cause of action to come within the six year statute of limitation it is not required that it shall be evidenced by writing and signed by the party sought to be charged; but that it is only necessary that the cause of action shall be provable by writing." *id.* at 826, 98 So. at 228.

[5]The court used the following language in explaining its holding that the use of *implied* in the six year statute meant *implied in law*: "The distinction between an express and an implied contract is, that in one the liability arises from the contract, and in the other the contract is implied, or arises from the liability. An implied contract never exists except in the absence of an express one; and, as all written contracts are necessarily express, it follows that the distinction between written and verbal or parol, contracts can only be applied to those of the latter class." Musgrove v. Jackson, 59 Miss. 390, 392 (1882).

[6]Madison County v. Collier, 79 Miss. 220, 30 So. 610 (1901).

[7]In Madison County v. Collier, 87 Miss. 204, 30 So. 610 (1901) the court withdrew its opinion as reported in 79 Miss. 220, substituting therefor that the six year statute was applicable. The reversal was justified on the ground that by Swann v. Buck, 40 Miss. 268 (1866), the law was well settled in this state that the aforesaid action did not arise in contract at all; but that it fell within § 2737, Amended Ann. Code of 1892; appearing as § 2292, Code of

concluded that the claim was barred only by Section 2292, Code of 1930 at the end of six years.[8]

The question as to when a quasi contract obligation should be barred arose again in *Buntyn v. Building & Loan Ass'n.*[9] Here the action was to recover usurious interest. The court held that all contracts implied in fact or law, as well as all express parol contracts, should be barred in three years.[10] This rule was later affirmed in *Beck v. Tucker,*[11] where it was applied again to the same type of action. We might think then, that the established rule in Mississippi is that parol contracts and quasi contracts are barred by the same period of three years. However, such is not the case.

A decided confusion has arisen from a misinterpretation of an early case, *Fowlkes v. Lea.*[12] This case has been cited in numerous

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1930 which reads as follows: "All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after."

Subsequently, after the United States Supreme Court in Robertson v. Miller, 276 U. S. 174, 72 L. ed. 517 (1928), held that an action by a public officer to recover his statutory salary did arise from an implied contract, the Mississippi Court in DeSoto County v. Wood, 150 Miss. 432, 116 So. 738 (1928), said: "Whether we now follow and apply the doctrine of that case [Madison County v. Collier, 87 Miss. 204, 30 So. 610 (1901), cited note 4, *supra*] or whether we adopt and apply the doctrine of the United States Supreme Court as expressed in the recent case of Robertson v. Miller [quoted, note 7, *supra*] . . . . the conclusion reached must be the same. The claim or action therefor is not upon an implied contract provable by parol, but is one provable by a writing. The promise to pay is implied by law after the services have been rendered by a public officer, but it is a promise the terms of which are provable by a writing embodied in the statute fixing the compensation which will be paid upon the performance of the services by officer." *id.* at 436-7, 116 So. at 738.

[8]DeSoto County v. Wood, 150 Miss. 432, 116 So. 738 (1928).

[9]86 Miss. 454, 38 So. 345 (1905).

[10]"The distinction sought to be drawn between contracts implied in fact and contracts implied in law cannot be maintained under our statute [MISS. CODE (1892) § 2739, carried over as MISS. CODE ANN. (1930) § 2299]. All implied contracts in this state are subject to the bar of three years, as provided in Code, 1892, § 2739 [MISS. CODE ANN. (1930) § 2299]." *id.* at 456, 38 So. at 345.

[11]147 Miss. 401, 113 So. 209 (1927): "So it is settled in Mississippi that the three-year statute of limitations applies in suits to recover illegal or usurious interest in violation of the six per cent statute." *id.* at 411, 113 So. at 211.

[12]84 Miss. 509, 36 So. 1036, 68 L. R. A. 925, 2 Ann. Cas. 466 (1904); *cf.* I. C. R. R. v. Jackson Oil Co., 111 Miss. 320, 71 So. 568 (1916). In an even earlier case, Washington v. Soria, 73 Miss. 665, 19 So. 485, 55 Am. St. Rep. 555 (1896), the controlling authority in Fowlkes v. Lea, a suit whereby the vendor sought to recover the unpaid purchase money where the vendee of land had taken possession under a conveyance reciting a consideration of a certain amount paid in cash and a balance to be paid in installments at specified dates, to secure which a lien is reserved in the deed, the court held the six year statute applicable, saying in part, *id.* at 677, 19 So. at 487: "In either event the promise of the defendant whether it be express [referring to the alternative of treating the promise set out in the deed as the promise of defendant because of his acceptance, thus operating an estoppel upon him to

later decisions[13] as standing for the proposition that a contract implied in law, *if provable by writing,* is barred only by the six year statute. The facts of that case were: *A* conveyed certain land to *B* by a deed which recited a consideration of $400 received in hand. As a matter of fact, no money was paid. Five years later *A* brought suit against *B* to foreclose his common law purchase money lien. He established in evidence that the consideration was not paid by *B* at the time of the conveyance. *B* then sought to show that the suit could not be brought because there was no promise in writing to pay, and hence the action was barred by the three year statute, and the lien was extinguished with the debt. The court held against this contention, and declared that where the deed recited that there was a consideration and it was shown that none was paid, the law would imply a promise to pay, and that this promise, arising from circumstances appearing on the face of the deed, would be considered to be a promise in writing, and hence barred only by the six year statute.

Now let us analyze this case. The court called the promise one "implied by law." If by this statement the court means merely that the circumstances attendant on the execution of the deed lead to the natural inference that *B* must be understood as intending to pay for the land, it employed language which only approximated the idea it had in mind. Although "the law" is the agency that makes the implication, yet this is true of every contract implied in fact. The term, contract implied in law, should properly be reserved for those obligations which we have already designated as quasi-contractual. In the present case the obligation to pay arose by virtue of a contract based on a true agreement.[14] The deed recited a consideration, thus showing that the parties were not intending a gratuity. When it is then shown that the cash was not paid, it is natural to deduce as a fact that it was intended by the parties that the price of $400 should be paid later. So long as the court is seeking to find the intention of the parties, it cannot be said that the promise it is enforcing is fictitious.

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deny it to contain his written contract] or implied, is to perform a contract, the terms of which are written, and not unwritten. The promise to pay is implied by law, but it is a promise to perform a written, and not an unwritten contract."

[13]Masonic Benefit Ass'n v. Bank, 99 Miss. 610, 55 So. 408 (1911); I. C. R. R. v. Jackson Oil & Refining Co., 111 Miss. 320, 71 So. 568 (1916); Milam v. Paxton, 160 Miss. 562, 134 So. 171 (1931); City of Hattiesburg v. Cobb Bros. Const. Co., 174 Miss. 20, 163 So. 676 (1935).

[14]Many of the cases which the court has dealt with under the term "promise implied in law" have really been promises implied in fact as in Fowlkes v. Lea. For example, see Washington v. Soria, 75 Miss. 665, 19 So. 485, 55 Am. St. Rep. 555 (1896); Benefit Ass'n v. Bank, 99 Miss. 610, 55 So. 408 (1911); I. C. R. R. v. Jackson Oil Co., 111 Miss. 320, 71 So. 568 (1916); Fed. Land Bank v. Collins, 156 Miss. 894, 127 So. 570 (1930).

The result reached is thoroughly justifiable and is in line with the general trend of authority in treating this promise which is implied from the writing as a written promise. But the confusion has resulted from the use of the words "implied in law." The result has been that there is a tendency in Mississippi to say that if a genuine quasi contract obligation involves a writing, the six year, and not the three year, statute applies.

The most outstanding example is the case of *Milam v. Paxton.*[15] Plaintiff sought to recover money paid under a contract which was unenforceable because of the Statute of Frauds. An action of this nature is a well recognized branch of quasi contract,[16] and under the doctrine laid down in *Buntyn v. Building & Loan Ass'n,* the plaintiff would have been barred by the three year statute. But the court seized hold of the fact that defendant had given plaintiff a receipt for the money, and applying the misleading language of *Fowlkes v. Lea,* held that there was a sufficient acknowledgement in writing of a state of facts out of which the law implied an obligation to repay, and therefore the obligation did not rest in parol.[17]

The truth is that the obligation rests neither in parol nor in writing; it is an implied obligation, a pure fiction of law. What the court really means is that if the circumstances which show the unjust enrichment is evidenced by a writing, the court will apply the six year statute, otherwise it will apply the three year limitation. Is this a good rule?

Having once adopted this rule that the statute applicable shall be determined by whether the evidence is in writing, the most important question, and the one subject to greatest confusion presents itself: Just what must be in writing?

It will be remembered that quasi contract is based fundamentally on two propositions:[18] (1) The defendant holds money or goods of the plaintiff; (2) this holding is against good conscience.

The evidence which establishes the holding itself is usually simpler than the evidence which shows that the holding is unjust.

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[15]160 Miss. 562, 134 So. 171 (1931).

[16]Here we do not, as in Fowlkes v. Lea, have any facts from which it can be implied that the defendant promised to pay. The only promise which defendant made was to convey the land. But because plaintiff is unable to enforce the promise by reason of the Statute of Frauds, the law allows plaintiff to recover his money back, fictitiously supplying a promise.

[17]The court in Cock, Adm'r v. Abernathy, Adm'r, 77 Miss. 872, 28 So. 18 (1900) under a like misapprehension of Washington v. Soria, 73 Miss. 665, 19 So. 485, 55 Am. St. Rep. 555 (1896), the latter being very similar to Fowlkes v. Lea, also held the receipt sufficient written evidence to take the case out of the three year statute.

[18]WOODWARD, THE LAW OF QUASI CONTRACT (1913) § 4.

Is the writing required simply a written evidence of the receipt of the money, or must the circumstances showing the unjustness of the holding also be evidenced by writing?

In the case of *Milam v. Paxton*, just considered, the court seemed to be of opinion that the six year statute is applicable if the receipt of the money is evidenced by writing. It is true that the written instrument showed that money had been received in part payment of the land to be conveyed. It also showed roughly the transaction which gave rise to the action. But did it show the circumstances which made the holding unjust? This circumstance was the fact that the agreement was unenforceable because there was no written contract to convey. Clearly this absence of a written promise is not proved by the written receipt.

Must all circumstances attendant on the transaction be provable by writing? According to the case just considered, apparently not. Yet the rule as pronounced by the Court in *City of Hattiesburg v. Cobb Bros. Const. Co.*[19] was as follows:

> "The promise to pay need not be expressed in writing, nor is it necessary for the writing to be signed by the promisor. However, the promise to pay must arise out of the writing by implication, and furthermore, the entire material facts out of which the implied promise to pay arises must be provable by writing; it may be one writing or several. If there is any break in the chain of the writings and such break has to be supplied by parol testimony, then the three years' statute applies, and not the six years' . . ."[20]

It is evident then, that the Mississippi law on the Statute of Limitations as applied to quasi contract actions is far from settled. On the one hand, there are two decisions holding that the three year statute shall apply regardless of the nature of the evidence.[21] Both these cases involved an action to recover usurious interest. It may well be that the court felt that an action of this type should

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[19]174 Miss. 20, 27-8, 163 So. 676, 678 (1935).

[20]The rule as laid down earlier in Foote v. Farmer, 71 Miss. 148, 150, 14 So. 445, 446 (1893) was: "The statute mentioned bars actions on any unwritten contract in three years. To take a case out of this statute, there must be a writing evidencing an acknowledgment of an indebtedness or promising to pay, in such terms as to render supplemental evidence unnecessary." This rule was adopted and followed in Wally v. Dantzler Lumber Co., 119 Miss. 700, 81 So. 489 (1919); Fed. Land Bank v. Collins, 156 Miss. 894, 127 So. 570 (1930); Blount v. Miller, 172 Miss. 492, 160 So. 598 (1935).

It is difficult to understand how the above rule can be applied intelligently to a contract implied solely in law. For, if there is a writing acknowledging an indebtedness, the promise arising therefrom is implied in fact.

[21]Buntyn v. Building & Loan Ass'n, 86 Miss. 454, 38 So. 345 (1905); Beck v. Tucker, 147 Miss. 401, 113 So. 209 (1927).

be brought promptly or not at all. If this is true, it is not to be expected that the rule established will be extended to other more meritorious controversies. Opposing that rule are those cases holding that the statute applicable shall be determined by whether the evidence establishing the right of action is oral or written.[22] Within this rule, however, the decisions are not harmonious. Some have indicated that the only writing required is one evidencing the receipt of the benefit.[23] The court at other times has been more strict, and declared that every step in the transaction must be in writing.[24]

In view of this manifest confusion it is earnestly recommended that a statute be passed providing that all actions in quasi contract; that is, on contracts implied in law, be barred by some definite period of years. It seems to the writer that a period of three years would best serve the needs of our system of jurisprudence. In an action on a contract implied in law the evidence showing a right to recover is usually highly controverted, and the facts involved are multifarious. Furthermore, in such instances the moral claims of the litigants are sharply counterpoised. It is perhaps better that controversies of this nature should be put at rest as soon as possible.

Claude T. Coffman

The Constitutionality of Mississippi's Industrial Program

At an extraordinary session of the Mississippi Legislature held during September, 1936, a law was enacted to enable county and municipal governments to issue bonds to be sold and the proceeds of such sale to be used in the construction and operation of industrial plants.[1]

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[22]Foote v. Farmer, 71 Miss. 148, 14 So. 445 (1893); Washington v. Soria, 73 Miss. 665, 19 So. 485, 55 Am. St. Rep. 555 (1896); Fowlkes v. Lea, 84 Miss. 509, 36 So. 1036, 68 L. R. A. 925, 2 Ann. Cas. 466 (1904); City of Hattiesburg v. Cobb Bros. Const. Co., 174 Miss. 20, 163 So. 676 (1935).

The court in Warren Godwin Lumber Co. v. Lumber Mineral Co., 120 Miss. 346, 349-50, 82 So. 259 (1919) recognized these two lines of decisions in the following language: "Whether the six-year statute governs in the case of an implied contract arising out of a written contract, or, as stated in Buntyn v. B. & L. Ass'n, 86 Miss. 454, 38 So. 345, 'All implied contracts in this state are subject to the bar of three years' . . . "

[23]Cock, Adm'r, v. Abernathy, Adm'r, 77 Miss. 872, 28 So. 18 (1900); Milam v. Paxton, 160 Miss. 562, 134 So. 171 (1931).

[24]Foote v. Farmer, 71 Miss. 148, 14 So. 445 (1893); City of Hattiesburg v. Cobb Bros. Const. Co., 174 Miss. 20, 163 So. 676 (1935).

[1]Miss. Laws Ex. Sess. 1936, H. B. No. 1, Industrial Program (approved Sept. 19, 1936). These acts have not been published at this time.

This act, known as the B. A. W. I. Act,[2] provides for a three-member Industrial Commission, appointed by the Governor, with summary power to approve or reject the application of any county or municipality to issue bonds under the plan. There is a three-fold criterion upon which a favorable decision must be based: (1) sufficient natural resources, (2) available labor supply, (3) property values and suitable financial conditions.[3]

After a favorable action by the commission, before the plan will be put into effect, an election must be held in the county or municipality to be affected, in which election two-thirds of the qualified electors voting must favor the issue. After the erection of the plant, the municipality or county is authorized to lease, sell, or otherwise dispose of the enterprise, or, upon compliance with certain stipulations laid down by the commission, to *operate* the industries themselves.[4]

As has been shown by discussion prior to the passage of the act, and controversies arising immediately following its enactment, the constitutionality of the act will be emphatically questioned—especially on two paramount points:

First: Does the act contravene Sections 183 and 258[5] of the Constitution of Mississippi of 1890?

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[2]Balance Agriculture with Industry Act.

[3]Miss. Laws Ex. Sess. 1936, Sen. B. No. 1, § 8(a).

[4]See White, *Mississippi Bids for Industry* (Dec. 1936) 44 REVIEW OF REVIEWS 30.

[5]Section 183: "No county, city, town, or other municipal corporation, shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or loan its credit in aid of such corporation or association. . . . "

Section 258: "The credit of the state shall not be pledged or loaned in aid of any person, association, or corporation. . . . "

Section 183 was passed to prevent public credit being pledged to private enterprises, in view of the grievous results which had followed such pledging of credit in the past, this character of legislation being largely for the repudiation of the state bonds. Between 1830 and 1840 a great many private acts were passed chartering corporations and giving them powers of railroad and banking corporations, and pledging the state's credit for the bonds issued under such acts. Inflation and collapse followed, causing great public excitement. As a result, the bonds were repudiated with the approval of the electorate of the state. This section does not prevent a municipality from contracting with a private corporation for the purpose of lighting streets, furnishing the conveniences of lights, water, gas, and "other things of a *similar* character." [Authors' italics.]

Section 258 went even further and specifically prohibited the state from paying any indebtedness arising out of "Union Bank" bonds and "Planters' Bank" bonds. Though necessary from an economical standpoint, this action by the legislature has been severely criticized as dishonoring the public reputation.

Second: Would this act result in the taxation of private property for private purposes, in direct contravention of the general constitutional limitations?[6]

I

In the recent case of *Carothers v. Town of Booneville,*[7] the Supreme Court of Mississippi held that a proposed bond issue[8] for the purpose of purchasing a site and erecting a building to be leased to a garment factory, was invalid under Section 183 and under the due process clause of the State Constitution.[9] In so holding, the court pointed out that under the act of the legislature authorizing the issuance of the bonds, the credit of the town of Booneville was pledged for the payment of the proposed bond issue, and that the *municipality was not authorized to operate a manufacturing enterprise itself,* but only to issue bonds for the purchase of a factory site and the erection of the building.

If this failure to provide for the operation by the municipality was the controlling factor in the court's decision, the Industrial Act has remedied the defect found in the Booneville Act, in that the present act authorizes the municipality to *operate* the particular industry.[10] It would seem, however, that this language of the court was by no means necessary to the decision in that particular case and that the case of *Carothers v. Booneville* is logically a direct declaration of the unconstitutionality of the Industrial Act.

The state of North Dakota had a constitutional provision[11] similar to Section 183 of the Mississippi Constitution. This section was amended in 1919 to include the following:

> "The state, any county, or city may make internal improvements, and may engage in any industry, enterprise,

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[6]U. S. CONST. Art. XIV; MISS. CONST. (1890) § 14. "Even when there is no express restriction in the constitution, there is an implied restriction under which the legislature cannot rightfully impose taxes for the benefit of private persons or in aid of private uses or enterprises." 61 C. J. 88, § 18, citing Lowry v. Greenville, 122 So. 198 (Miss. 1929); Lowry v. City of Clarksdale, 154 Miss. 155, 122 So. 195 (1929).

[7]169 Miss. 511, 153 So. 670 (1934).

[8]Authorized by Miss. Laws Ex. Sess. 1932, H. B. No. 4.

[9]See notes 5 and 6, *supra.*

[10] " . . . . if such certificate is issued, it shall authorize the particular municipality to acquire, to own, and *to operate* the particular type of industry. . . . " [Authors' italics.] Miss. Laws Ex. Sess. 1936, Sen. B. No. 1, § 8(a).

[11]N. D. CONST. (1889) § 185: "Neither the state, nor any county, city, township, town, school district, nor any other political sub-division, shall give its credit or make donations to, or in aid of any individual, association or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association, or corporation, nor shall the state engage in internal improvement unless authorized by a two-thirds vote of the people."

> or business, not prohibited by Article 22 of the Constitution, but neither the state nor any political subdivision thereof shall otherwise loan, or give its credit or make donations to or in the aid of any individual, association, or corporation, except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation."[12]

It was *after* this constitutional amendment that the Supreme Court of that state upheld acts similar in form to the Mississippi Act but much more limited in scope.[13] These acts included provisions for the North Dakota Mill and Elevator Association,[14] having for its purpose the manufacturing, and marketing of farm products, and requiring the establishment of a system of warehouses, elevators, flour mills, plants, factories, and markets; the Home Building Association of North Dakota,[15] created to provide homes for residents at a stated price; and the Bank of North Dakota[16] with a capitalization of $2,000,000. An Industrial Commission of three men exercised control over these government subsidiaries.

The North Dakota Supreme Court, in upholding the acts, referred expressly and pointedly to the amendment to the constitution. If Mississippi relies upon the North Dakota decision as authority, Section 183 would have to be amended before the Industrial Act could be upheld.

In considering the problem whether a corporation is private so as to fall within the inhibition of Section 183, the Supreme Court of Mississippi has said:[17] "Is the corporation's continuity, control, and management under the power of the public through public agents, who are responsibly accountable to the government?" From the facts then before the court, that test was laid down with a view towards the control of the particular enterprise there involved—a local hospital.[18] The courts are agreed that this type of institution is vested with a public purpose. Therefore that declaration, while decisive on the point of control, cannot be laid down as a broad test upon which the constitutionality of the Industrial Act may be based. It is believed that such control of the industries, exercised by public officers as is plainly required by the above test, would

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[12]N. D. CONST. (1889) Art. 32.

[13]Green v. Frazier, 44 N. D. 395, 176 N. W. 11 (1919), *aff'd* 253 U. S. 233, 40 Sup. Ct. 499, 64 L. ed. 878 (1920).

[14]N. D. Laws 1919, c. 152, 153.

[15]N. D. Laws 1919, c. 150; N. D. Laws Spec. Sess. 1919, c. 24, as amended by c. 39.

[16]N. D. Laws 1919, c. 147, 148, 154 as amended by N. D. Laws, 1921, c. 154.

[17]Brister v. Leflore County, 156 Miss. 240, 247, 125 So. 816 (1930).

[18]Feemster v. City of Tupelo, 121 Miss. 733, 83 So. 804 (1920).

greatly lessen the inducement for the introduction of private corporations into Mississippi. This introduction and establishment is one of the major purposes of the Industrial Act.

If the court should decide that the act is unconstitutional in part, it is then confronted with the question of possible divisibility. Should the act be found indivisible, then the entire legislation would fail. However, if the act is declared unconstitutional as to the power of the municipality to lease or sell, it will lose its desirability in the eyes of the citizens. Such a declaration would leave the municipality with only the power to operate the particular industry through the Industrial Commission. With the influx of outside industries cut off, the local citizens would be hesitant to favor the remainder of the program.

II

Would the Industrial Act result in the taxation of private property purposes, in direct contravention of the general constitutional limitations?

The courts have readily recognized that no inflexible rule can be formulated as to what is a public purpose, but leave each case to stand or fall on its own peculiar circumstances. It is the universal rule that the benefit must be direct and not incidental.[19] There is a diversity of opinion as to the degree of benefit necessary to the community. But in all cases it is admitted "that the number to be benefited and the nature of the gain are of prime concern."[20]

The following have been held to be impregnated with such public purpose as to authorize the exercise of the taxing power toward their establishment or maintenance: cemeteries;[21] forest preserves;[22] interstate or international expositions;[23] municipal ice plants;[24] public works;[25] railroads;[26] the development of water re-

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[19]61 C. J. 91: "Any direct public benefit will sustain a tax." 26 R. C. L. 59, § 41: "Money raised by taxation cannot be lawfully expended to contribute aid to any kind of manufacturing carried on by a private individual or corporation for profit, and not under obligation to serve the public, even if the establishment will be of indirect benefit to the people of a city or town, which is for that reason desirous of making the contribution."

[20]Note (1928) 41 HARV. L. REV. 775, 777 (discussing state and municipal excursions into business enterprises as public purposes under the taxing power).

[21]Town of Pulaski v. Ballentine, 153 Tenn. 393, 284 S. W. 370 (1926).

[22]Perkins v. Board of Comm'rs of Cook County, 271 Ill. 449, 111 N. E. 580 (1916).

[23]Minneapolis v. Janney, 86 Minn. 111, 90 N. W. 312 (1902); State v. Cornell, 53 Neb. 556, 74 N. W. 59 (1898).

[24]City of Tombstone v. Macia, 30 Ariz. 218, 245 Pac. 677 (1926). But see Union Ice & Coal Co. v. Town of Ruston, 135 La. 898, 66 So. 262 (1914).

[25]People v. Lee, 72 Colo. 598, 213 Pac. 583 (1923).

[26]City of Boston v. Jackson, 237 Mass. 403, 130 N. E. 390, *aff'd* 260 U. S. 309, 43 Sup. Ct. 129, 67 L. ed. 274; Olcott v. Fond du Lac County, 83 U. S. 678, 21 L. ed. 382 (1873).

sources for domestic use, irrigation, and light and power;[27] public buildings;[28] public charitable and reformatory institutions;[29] public parks or pleasure grounds;[30] public schools, colleges and universities;[31] the manufacture, distribution, and sale of cement;[32] the promotion of agricultural work,[33] or of land settlement.[34]

On the other hand, the courts of the various states have refused to allow support of the following by taxation: the buying and selling of gasoline;[35] the maintenance of art museums controlled by a private corporation;[36] purchase of a box factory to be leased to a private corporation;[37] the support of private business or manufacturing enterprises;[38] support of private and sectarian institutions, not controlled by the state or municipality.[39]

At the present time, the courts look upon legislative enactments, passed under the motivation of public purpose, as being indicative of the public policy of the state. Giving little weight to former decisions,[40] or usages, they are prone to uphold the validity of such acts,[41] unless they are plainly in evasion of constitutional limitations[42] or unless they constitute an invasion of private liberty

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[27]Gallardo v. Porto Rico Ry., Light & Power Co., 18 F. (2d) 918 (C. C. A. 1st, 1927); McCord Mercantile Co. v. McIntyre, 25 Colo. App. 376, 138 Pac. 59 (1914).

[28]Kinney v. City of Astoria, 100 Ore. 514, 217 Pac. 840 (1923).

[29]Hager v. Kentucky Childrens' Home Soc., 119 Ky. 235, 83 S. W. 605 (1904).

[30]Salisbury Land and Improvement Co. v. Commonwealth, 215 Mass. 371, 102 N. E. 619 (1913).

[31]Kelly v. Pittsburg, 104 U. S. 78, 26 L. ed. 659 (1881); Knights v. Treasurer and Receiver General, 237 Mass. 493, 130 N. E. 60 (1921), *aff'd* 260 U. S. 12, 43 Sup. Ct. 1, 67 L. ed. 102 (1922).

[32]Eakin v. South Dakota State Cement Comm., 44 S. D. 268, 183 N. W. 651 (1921); *In re* Opinion of the Judges, 43 S. D. 648, 180 N. W. 957 (1920).

[33]Carman v. Hickman County, 185 Ky. 630, 215 S. W. 408 (1919); Bon Homme County Farm Bureau v. Board of Comm'rs of Bon Homme County, 53 S. D. 174, 220 N. W. 618 (1928); Briggs v. City of Raleigh, 195 N. C. 223, 141 S. E. 597 (1928).

[34]Wheelon v. South Dakota Land Settlement Board, 43 S. D. 551, 181 N. W. 359 (1921).

[35]White Eagle Oil & Refining Co. v. Gunderson, 48 S. D. 608, 205 N. W. 614 (1925). But see Standard Oil Co. v. City of Lincoln, 114 Neb. 243, 207 N. W. 172, 108 N. W. 962; *aff'd* 275 U. S. 504, 48 Sup. Ct. 155 (1927).

[36]State v. St. Louis, 216 Mo. 47, 115 S. W. 534 (1908).

[37]Ferrell v. Doak, 152 Tenn. 88, 275 S. W. 29 (1925).

[38]Briggs v. Raleigh, 195 N. C. 223, 141 S. E. 597 (1928); *In re* Opinions of the Justices, 118 Me. 503, 106 Atl. 865 (1919); Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442 (1882); City of Ottawa v. Carey, 108 U. S. 110, 2 Sup. Ct. 361 (1883); Cole v. La Grange, 113 U. S. 1, 5 Sup. Ct. 416 (1885); Clee v. Sanders, 74 Mich. 692, 42 N. W. 154 (1889).

[39]Atchison T. & S. F. Ry. v. Atchison, 47 Kan. 712, 28 Pac. 1000 (1892).

[40]City of Tombstone v. Macia, 30 Ariz. 218, 245 Pac. 677, 680 (1926), in which case the court upheld funds raised for erection of combined electric light, power and ice plant as being for public purposes.

[41]Hinds County *et al.* v. Johnson *et al.*, 133 Miss. 591, 98 So. 95 (1923).

[42]1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 264.

or an encroachment upon the field of private enterprise.[43] The trend in this field of law is unmistakable. A review of the early decisions will evidence the extent to which the courts have groped about in attempting to evolve, without reference to any specific constitutional provision, some definite standard for the so-called "public purpose" rule.

Originally, the courts sought to base the elusive test of public purpose upon prior usage.[44] This test availed nothing because if rigidly followed, it paralyzed all possibility of progress and growth in this phase of the law. In more recent cases, the terminology of the decisions has centered less around usage, and has referred more and more to the necessity of recognizing growth in the effective activities of government and law. There has therefore been a tendency toward upholding legislative enactments as being determinative of public purpose.[45] Realizing that no clear rule of public purpose had been laid down, some courts resorted to argument by analogies, which often led them into far-fetched conclusions. The manufacture of ice by a municipality was declared constitutional because the court could see no distinction between the distribution and sale of water in its natural and its frozen state.[46] This method of determining one purpose to be public because of certain similarities between its features and those of a purpose already upheld as public, offers no test of general application.

In 1914, the Supreme Court of Maine in the important case of *Laughlin v. Portland*[47] met the issue of public purpose squarely, admitting the non-existence of an inexorable rule for determining public purpose, but laying down two important tests: first, the subject matter or commodity must be one of "public necessity, convenience, or welfare;" second, there must be a recognized difficulty which individuals have in providing the commodity for themselves. These tests are too general to be of much value. However, the Maine court in speaking of an application of the tests, expressly excluded enterprises similar to those contemplated under the Indus-

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[43]Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, 256 (1917).

[44]People v. Salem, 20 Mich. 452 (1870).

[45]Sun Printing Co. v. New York, 8 App. Div. 230, 40 N. Y. S. 607, *aff'd* 152 N. Y. 257, 46 N. E. 499 (1897).

[46]Holton v. Camilla, 134 Ga. 560, 68 S. E. 472 (1910). But see Union Ice & Coal Co. v. Ruston, 135 La. 898, 66 So. 262, at 269 (1914), caustically but without logic criticizing the case of Holton v. Camilla: "Putting aside the frozen water argument . . . . all analogy between municipal distribution of water and the municipal distribution of ice is destroyed by the fact that for one business pipes have to be laid in public streets, and necessarily for doing this the streets have to be torn up and disturbed, whereas the other is purely competitive enterprise."

[47]111 Me. 486, 90 Atl. 318 (1914) (holding a wood yard to be a public purpose).

trial Program. In regard to cities entering upon commercial business, grocery stores, meat markets, and bakeries, it said:

> "Such kinds of businesses do not measure up to either of the two accepted tests. The commodities mentioned are admittedly, under the present economic conditions, regulated by competition in the ordinary channels of private business enterprise. The principle that municipalities can neither invade private liberty nor encroach upon the field of private enterprise should be strictly maintained, as it is one of the main foundations of our prosperity and success."[48]

Legislation under almost identical circumstances has been severely criticised as being discriminatory among the classes of business.[49]

On the other hand, it is entirely within the province of the people and the legislature to determine the wisdom of the act. The courts of Mississippi will not concern themselves with whether the statute is wise or unwise in passing upon the question of constitutionality.[50] And if the Supreme Court of Mississippi declares the Industrial Act constitutional, on appeal under the due process clause the Supreme Court of the United States would be prone to affirm the decision of the state court.[51]

A study of the cases indicates that the courts are becoming more and more liberal in their determination of what activities may be considered as being for a public purpose. The modern trend[52]

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[48]See Laughlin v. Portland, 111 Me. 486, 90 Atl. 318 (1914).

[49]Citizens Savings and Loan Ass'n of Cleveland v. City of Topeka, 87 U. S. 655 (1875): "But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally deserving the aid of citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

[50]Mississippi Fire Ins. Co. v. Planters Bank of Tunica, 138 Miss. 275, 103 So. 84 (1924).

[51]Green v. Frazier, 253 U. S. 233, 40 Sup. Ct. 499, 64 L. ed. 878 (1920): "Judicial interference with state tax legislation the purpose of which has been declared by the people of the state, the legislature, and the highest state court to be of a public nature and within the taxing power of the state, cannot be justified unless it is clear beyond reasonable controversy that rights secured by Federal Constitution have been violated." Green v. Frazier is distinguished from Loan Association v. Topeka, cited *supra* n. 49, because in the latter case, the Supreme Court of the United States had before it no declaration from the Kansas Courts of that state's public policy.

[52]Maxey, *Is Government Merchandising Constitutional?* (1918) 52 AM. L. REV. 215 (Predicting that if the demand for government merchandising becomes sufficiently insistent, general and continuous, the courts will eventually

evidences a readiness on the part of the courts to uphold plans which circumvent constitutional limitations and prohibitions established by previous decisions in regard to similar acts.

> "Economic conditions and accepted theories change rapidly in this field; the law has changed with them, and no doubt will continue to do so. Now that the Supreme Court has evinced a determination to defer so largely to the state tribunals, it is chiefly in the latter that limitations on state socialism will be found. And the state courts are in the main turning from doctrinal abstractions to a consideration in each case of particular social, political, and economic facts."[53]

Diligent search has revealed but one state[54] whose industrial program has in its fundamentals approached the broad scope covered by the Industrial Act. In that state, the Supreme Court of the United States justified the public purpose of the legislative acts on the peculiar need of a more efficient handling and marketing of the state's principal agricultural product and major export (wheat), the production of which vitally affected every business in the state.[55]

Do the peculiar circumstances existing in Mississippi today present such grounds that the courts will declare this act infused with a valid public purpose?[56] On the one hand, we have the recognized needs of the state.[57] On the other hand, in addition to

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find a way to remove their own objections to it). See, also, McAllister, *Public Purpose in Taxation* (1930) 18 CALIF. L. REV. 137, 251-254. For an interesting article upon the modern trend of legislative acts whereby revenue-producing improvements can be constructed on a self liquidating basis, see Foley, *Public Revenue Financing* (1936) 35 MICH. L. REV. 1.

[53]Note (1928) 41 HARV. L. REV. 775, 779.

[54]North Dakota.

[55]Green v. Frazier, 44 N. D. 395, 176 N. W. 11 (1919), *aff'd* 253 U. S. 233, 40 Sup. Ct. 499, 64 L. ed. 878 (1920).

[56]Durant, Mississippi, in January, 1937, was the first municipality to take action under the present Industrial Program, unanimously voting a bond issue for the construction of a hosiery plant. This action by Durant will probably furnish the test case for the B. A. W. I. Act.

[57]Preamble to Mississippi's Industrial Act:

"WHEREAS, there exists an acute, economic emergency for which the requisite remedy is the balancing of agriculture with industry as herein done, said emergency having decreased Mississippi's industrial enterprises so that many of her citizens are on relief and are leaving the State; and

"WHEREAS, the purchasing power of her citizens has been seriously impaired and agricultural activities have been curtailed by reason of conditions for which her citizens are in no way responsible, and the markets for her principal export, cotton, have been threatened and are being occupied by other nations; and

"WHEREAS, the sole remedy for saving agriculture in Mississippi is to develop industry so that her citizens may be afforded a livelihood and not be forced to seek gainful employment outside of her borders; and

"WHEREAS, the natural resources and raw products of the State are

taxing the public in general,[58] there is the resultant taxing of industries already existent for the establishment of rival industries —impoverishing the old to attract the new.

G. Lawrence Adams
Charles A. Pollard

The Implied Warranty That Food Will Be Fit To Eat

The very nature of an implied warranty makes difficult the laying down of any one rule of law in regard thereto. The warranty must be implied from the acts of the parties, or the nature of the transaction, or the policy of the law. Because of this, the numerous cases dealing with the particular subject, the implied warranty that food will be fit to eat, are often impossible to reconcile and difficult to classify.

No attempt will be made to discuss those cases in which the ultimate consumer sues the manufacturer, in which one other than the purchaser of the food brings suit either against the manufacturer or against a retail dealer, or restaurant keeper, nor will the question of privity of contract be discussed. In the second division of this article the discussion is limited to cases where the

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being carried beyond its boundaries for processing and for preparation for market to the detriment of its citizens; and

"WHEREAS, provision must be made for giving employment to her citizens when direct and indirect federal government relief is no longer existent; and

"WHEREAS, public necessity requires that cotton, cotton seed, clay, sand, gravel, wood, vegetable oil, nut oil, hides, vegetables, grain, grass, hay, potatoes, sugar cane, and other natural resources and products of the State should be processed and prepared in this State for market, thereby giving employment to the citizens and preventing dependency on governmental assistance through doles and relief; and

"WHEREAS, it is deemed necessary by the Legislature of the State of Mississippi to relieve such existing, emergency conditions and present public policy demands a program to encourage and to promote agriculture and industry, and to balance agricultural development with industrial expansion for the promotion of the general public welfare . . . . "

[58]As to the necessary interest of the objecting taxpayer, the weight of authority is that a resident taxpayer of a *municipal corporation* may sue to enjoin the illegal use of money of the *municipality.* Sutton v. Buie, 136 La. 234, 66 So. 956, 957 (1914). A contrary conclusion was reached in Doolittle v. Supervisors of Broome County, 18 N. Y. 155, 162, 163 (1858). The great majority of the states have upheld the taxpayer's right to enjoin unauthorized disposition of *state* funds or property; *cf.* Note (1929) 58 A. L. R. 588. See Fergus v. Russell, 270 Ill. 304, 110 N. E. 130, 135 (1915). But in regard to the validity of federal legislation, a taxpayer of the United States seeking to enjoin proposed appropriation, allegedly violating the Fifth Amendment, has been denied relief on the ground that his interest, shared with millions of other taxpayers was "comparatively minute and indeterminable." Massachusetts v. Mellon, 262 U. S. 447, 43 Sup. Ct. 597 (1923).

purchaser relies on the knowledge or skill of the retail dealer who sells him canned foods, thus restricting the discussion to the technical warranty of fitness for purpose.

Where a buyer makes known to the seller the particular purpose for which he buys and relies upon the seller's judgment or skill, a warranty of fitness for purpose arises.[1] This rule of law is often applied to the sale of foods,[2] but it is affected by many other considerations, as will be seen. The purchase of food in and of itself makes known to the seller the fact that it is to be eaten.[3] Furthermore, it is only in rare cases that a buyer does not rely on the knowledge and skill of the seller when he purchases food.

This was recognized in *Wiedeman v. Wheeler*,[4] where it was said:

> "As a general rule, we think that the decided weight of authority in the United States is, that in all sales of meats or provisions for immediate domestic use by a retail dealer, there is an implied warranty of fitness and wholesomeness for consumption."

If, then, we take this as the general rule, we may begin by dividing the cases into three main divisions:[5] (1) Where foods other than canned or sealed foods are sold by retail dealers; (2) where the food sold is canned or sealed; (3) where food is served on the premises as in a restaurant or hotel.

(1) *Where foods other than canned or sealed foods are sold by retail dealers.*

This line of cases fits our general rule perfectly.[6] The implied warranty of wholesomeness has been applied to potato salad,[7] to canned corn,[8] to half a ham,[9] to salami,[10] to meat infested with

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[1] MARIASH, SALES (1930) 324.

[2] Farrell v. Manhatten Market Co., 198 Mass. 271, 84 N. E. 481, 126 A. S. R. 436, 15 Ann. Cas. 1076, 15 L. R. A. (N. S.) 884 (1908).

[3] MARIASH, SALES (1930) 120; Rinaldi v. Mohican, 225 N. Y. 70, 121 N. E. 471 (1918).

[4] 171 Ill. 93, 49 N. E. 210 (1897).

[5] This does not include cases of food for animals, or suits other than between consumer and the person from whom he directly buys.

[6] Walters v. United Grocery Co., 51 Utah 565, 172 Pac. 472, L. R. A. 1918E 519 (1918).

[7] *Ibid.*

[8] Monahan v. Economy Grocery Stores Corp., 282 Mass. 548, 185 N. E. 34 (1933). In this case the food sold would place the case in the second division of this note. The court held that the evidence was insufficient to show that plaintiff was injured by the food, but apparently the suit on warranty was not open to demurrer.

[9] Holt v. Mann, ... Mass. . . . , 200 N. E. 40 (1936).

[10] Gindraux v. Maurice Mercantile Co., 4 Cal. (2d) 206, 47 P. (2d) 708 (1935).

trichinae,[11] to diseased chicken,[12] to dried beef unfit for food,[13] and to unwholesome ice cream.[14] The transactions involved above were clearly actual sales of the foods involved, and in some cases the Uniform Sales Act was given as the basis of the decision.[15]

In 1911, the Supreme Court of Mississippi indicated that an implied warranty of soundness of food for humans existed,[16] but it was by way of dicta, and no Mississippi case in point in this division has been found.

Until the adoption of the Uniform Sales Act, very little consideration was given to whether the buyer made known to the seller the purpose for which the goods were intended, and whether the buyer relied on the seller's skill or judgment. Some of the general statements were:

> "In contracts for provisions it is always implied that they are wholesome. . . . In the sales of provisions for domestic use, the vendor is bound to know that they are sound and wholesome at his peril."[17]

> "Accompanying all sales by a retail dealer of articles of food for immediate use there is an implied warranty that the same is fit for human consumption."[18]

> "On all sales of meats or provisions for immediate domestic use by a retail dealer, there is an implied warranty of fitness and wholesomeness for consumption."[19]

Section 15 of the Uniform Sales Act, provided that:

> " . . . . there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods sup-

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[11]Rinaldi v. Mohican Co., 225 N. Y. 70, 121 N. E. 471 (1918).

[12]Farrell v. Manhatten Market Co., 198 Mass. 271, 84 N. E. 481, 126 A. S. R. 436, 15 Ann. Cas. 1076, 15 L. R. A. (N. S.) 884 (1908).

[13]Flessher v. Carstens Packing Co., 93 Wash. 48, 160 Pac. 14 (1916).

[14]Race v. Krum, 222 N. Y. 410, 118 N. E. 853 (1918).

[15]Holt v. Mann, ... Mass. . . . , 200 N. E. 403 (1936); Rinaldi v. Mohican Co., 225 N. Y. 70, 121 N. E. 471 (1918). Similar statutes are in effect in many states. See I U. L. A. § 15.

[16]Dulaney v. Jones & Rogers, 100 Miss. 835, 57 So. 225 (1911).

[17]Van Bracklin v. Fonda, 12 Johns. 468, 7 Am. Dec. 399 (N. Y. 1815).

[18]Race v. Krum, 222 N. Y. 410, 118 N. E. 853 (1918).

[19]Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 210 (1897). To the same effect was § 1775 of the Civil Code of California, which provided that one who makes a business of selling provisions for domestic use warrants, by a sale thereof, to one who buys for actual consumption, that the provisions are good and wholesome. (Since repealed, Cal. Laws 1931, p. 2234). But see Farrell v. Manhatten Market Co., 198 Mass. 271, 84 N. E. 481 (1908) where it was said: "But even when the sale is by a dealer, if the provisions are selected by the buyer and the selection is not left to the judgment and skill of the dealer, the general rule of caveat emptor applies and the dealer is not liable if the provisions are not fit for food."

> plied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment . . . . , there is an implied warranty that the goods shall be reasonably fit for such purpose."

In *Rinaldi v. Mohican Co.*[20] it was said:

> "In a sale of food, therefore, there is no longer an implied warranty of fitness, unless the buyer expressly or by implication acquaints the seller with the purpose of the purchase, and unless it appears that the buyer relies on the seller's skill or judgment. . . .
>
> "We think that the mere purchase by a customer from a retail dealer in foods of an article ordinarily used for human consumption does by implication make known to the vendor the purpose for which the article is required."

The action brought to recover for breach of the warranty is usually either tort[21] or contract.[22] In the tort action for breach of an implied warranty, the scienter need not be pleaded or proved,[23] and in this action the basis is apparently the breach of a duty implied by law.[24]

Implied warranty is not the only basis for an action against a dealer selling impure foods. He may be sued instead for negligence.[25] In such a case, the rule is that persons who engage in the business of furnishing the food for consumption by man are bound

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[20]225 N. Y. 70, 121 N. E. 471 (1918). See, also, Holt v. Mann, ... Mass. . . . . , 200 N. E. 403 (1936); Gindraux v. Maurice Mercantile Co., 4 Cal. (2d) 206, 47 P. (2d) 708 (1935).

[21]Flessher v. Carstens Packing Co., 93 Wash. 48, 160 Pac. 14 (1916); Norton v. Doherty, 3 Gray 372, 63 Am. Dec. 758, (Mass. 1855); Farrell v. Manhatten Market Co., 198 Mass. 271, 84 N. E. 481 (1908).

[22]Monahan v. Economy Grocery Stores Corp., 282 Mass. 548, 185 N. E. 34 (1933); Holt v. Mann, ... Mass. . . . , 200 N. E. 40 (1936).

[23]Norton v. Doherty, 3 Gray 372, 63 Am. Dec. 758 (Mass. 1855); Farrell v. Manhatten Market Co., 198 Mass. 271, 84 N. E. 481 (1908).

[24]Flessher v. Carstens Packing Co., 93 Wash. 48, 160 Pac. 14 (1916). "Where there is a positive duty created by implication of law independent of the contract, though arising out of a relation or state of facts created by the contract, an action on the case as for a tort will lie for a violation or disregard of that duty."

In 3 BL. COMM. *165, it is said that case lies to recover damages for deceit, and this is apparently the old form of action. See Von Bracklin v. Fonda, 12 Johns. 468, 7 Am. Dec. 399 (N. Y. 1815).

[25]Madden v. Great A. & P. Tea Co., 106 Pa. 474, 162 Atl. 687 (1932); Great A. & P. Tea Co. v. Gwilliams, 189 Ark. 1037, 76 S. W. (2d) 65 (1934); Great A. & P. Tea Co. v. Crabtree, . . : . Ala. . . . , 161 So. 508 (1935); Craft v. Parker, Webb & Co., 96 Mich. 245, 55 N. W. 812 (1893).

to exercise care and prudence respecting the fitness of the articles furnished, and they may be held liable in damages if, by reason of any negligence on their part, corrupt or unwholesome provisions are sold and persons are made ill thereby.[26] But the jury may be permitted to infer negligence merely from the unwholesome character of the food.[27]

Some courts hold that no suit on an implied warranty can be maintained unless there is privity of contract between the parties, even when the person sued is a retailer, and the person to whom the retailer sold was not a dealer but a consumer;[28] and in these cases, negligence must be the basis of the suit.

(2) *Where the food sold is canned or sealed.*

These cases are properly within the scope of the first division, but because some courts hold the law to be different in the case of canned or sealed goods, the cases are separated.

The weight of authority is apparently to the effect that an implied warranty exists in the case of canned foods, as in the open food.[29] But other cases have held that no such warranty exists.[30] Where the warranty is allowed, the decision is based on the rule set out in division one. The other side of the argument is well set out in *Kroger Grocery Co. v. Lewelling*,[31] where it was said:

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[26]11 R. C. L. 1118; Great A. & P. Tea Co. v. Gwilliams, 189 Ark. 1037, 76 S. W. (2) 65 (1934).

[27]Madden v. Great A. & P. Tea Co., 106 Pa. S. 474, 162 Atl. 687 (1932). For an excellent discussion of implied warranty and negligence see Great A. & P. Tea Co. v. Eiseman, 259 Ky. 103, 81 S. W. (2d) 900 (1935).

[28]Chysky v. Drake Bros. Co., 235 N. Y. 468, 139 N. E. 576 (1923); Redmond v. Borden's Farm Products Co., 245 N. Y. 512, 157 N. E. 838 (1927). The latter case was one in which the mother of plaintiff bought the milk from defendant and fed it to plaintiff. A memorandum decision held that there was no privity of contract, and therefore no implied warranty.

The limitations of time and space do not permit a discussion of the question of privity in this article, and no attempt is made to cite cases other than those above on this point.

[29]Monahan v. Economy Grocery Stores Corp., 282 Mass. 548, 185 N. E. 34 (1933); Cleary v. First National Stores, ... Mass. . . . , 196 N. E. 868 (1935); Ward v. Great A. & P. Tea Co., 231 Mass. 90, 120 N. E. 225, 5 A. L. R. 242 (1918); Griffin v. James Butler Grocery Co., 108 N. J. L. 92, 156 Atl. 636 (1931).

[30]Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933); Bigelow v. Maine Central Ry. Co., 110 Me. 105, 85 Atl. 396, 43 L. R. A. (N. S.) 627 (1912); Julian v. Laubenberger, 38 N. Y. Supp. 1052 (1896); Walden v. Wheeler, 153 Ky. 181, 154 S. W. 1088 (1913); Scruggins v. Jones, 207 Ky. 36, 269 S. W. 743 (1925); Gindraux v. Maurice Mercantile Co., ... Cal. . . . , 36 P. (2d) 844 (1934); see Walters v. United Grocery Co., 51 Utah 565, 172 Pac. 473 (1918). This article does not include the purchase of canned goods by description. For a good case on that point see Ryan v. Progressive Grocery Stores, 225 N. Y. 388, 175 N. E. 105, 74 A. L. R. 339 (1931).

[31]165 Miss. 71, 145 So. 726 (1933).

> "The liability of implied warranty is bottomed upon the protection of public health; but that consideration can be conserved and at the same time the rule can be made to conform to what is equitable and just by placing the entire liability on the manufacturer or bottler or packer who prepares the food and seals it in containers, for there the canner has the opportunity and means, and therefore the duty to insure that no noxious or injurious substance shall get into the cans—an opportunity and means which the retail dealer does not have, and for which he should not be justly charged."

In *Bigelow v. Main Cent. Ry.*[32] the court held that there is

> " . . . . no rule of law which will imply a warranty of that of which it is impossible for a defendant to know by the exercise of any skill, knowledge, or investigation, however great. In other words, neither law nor reason require impossibilities."

An interesting case on this subject is *Gindraux v. Maurice Mercantile Co.*,[33] which was three times in the Supreme Court of California on original appeal and two rehearings. The case was in regard to the sale of salami. The salami was bought in a long roll, sealed in wax paper, and the retail dealer sold it by slicing off sections with butcher knife for various customers. On the original appeal[34] the court said:

> "The case here presented is a sealed package case where the vendor sold the manufactured article without possibility of inspection and without regard to negligence."

Later in the same opinion:

> "It is now generally recognized that, where the article is one of general use and put up by a reputable manufacturer or packer in a sealed can, the exterior of which is in good condition, the retailer is not responsible to his customer for the defective or unwholesome condition of the contents, unless and except at the time of the sale he expressly warrants the same to be free from defects."

The second opinion[35] held the same as the original, but the third[36] rendered by the court sitting *en banc,* held that this was

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[32] 110 Me. 105, 85 Atl. 396 (1912).
[33] . . . . Cal. . . . , 36 P. (2d) 844 (1934).
[34] *Ibid.*
[35] . . . . Cal. . . . , 37 P. (2d) 747 (1934).
[36] 4 Cal. (2d) 206, 47 P. (2d) 708 (1935).

not a sealed package case, and that even if it were, an implied warranty of merchantability would exist.[37] Here the court said:

> "We are not impressed with the suggestion that this is a sealed package case. Neither the facts nor the law renders the contention applicable here. The particular sale to plaintiff was of a piece of the salami sliced off the whole. It if were a sealed package case, it would still be within the rule of warranty of fitness and merchantability."[38]

(3) *Where food is served on the premises, as in a hotel or restaurant.*

In this division, there is a marked conflict between cases in various jurisdictions. Apparently the main ground for refusing an implied warranty in some jurisdictions is a distinction drawn between the serving or "uttering" of food, and the "sale" of food as by a retail dealer.[39] Generally those cases holding that a hotel or restaurant does not sell the food served to guests denies that any implied warranty exists,[40] while those courts that uphold the existence of the implied warranty do so on the ground that the transaction between the owner of the restaurant and the guests was a sale.[41]

In *Nisky v. Childs Co.*[42] it was said:

> "From the earliest times, however, a distinction has been drawn between a sale of an article and the furnishing of food at an eating house, hotel, or restaurant; the latter partaking rather of the character of service, in which case

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[37] Apparently as in Ryan v. Progressive Stores, 225 N. Y. 388, 175 N. E. 105 (1931).

[38] *Cf.* Bigelow v. Maine Cent. Ry., 110 Me. 105, 85 Atl. 396 (1912). In that case, the plaintiff was served canned asparagus, purchased by the defendant in the can from another. However, the can was opened by the chef and the contents prepared. Yet the court held that the rule of canned foods applied, and said that the defendant had no more means of inspection than had the plaintiff.

It is submitted that the Bigelow case was improperly classed as a "sealed package" case, and that when the chef opened the can he had a means of inspection. When the can was opened, the chef's "fifteen years experience" gave him a better chance of knowing the condition of the food than the plaintiff had.

[39] Nisky v. Childs Co., 103 N. J. L. 464, 135 Atl. 805, 50 A. L. R. 227 (1927); Lynch v. Hotel Bond Co., 117 Conn. 128, 167 Atl. 99 (1933).

[40] Nisky v. Childs Co., 103 N. J. L. 464, 135 Atl. 805 (1927); Lynch v. Hotel Bond Co., 117 Conn. 128, 167 Atl. 99 (1933).

[41] Mix v. Ingersoll Candy Co., 83 Cal. App. 84, 49 P. (2d) 877 (1935); Heise v. Gillette, 85 Ind. App. 551, 149 N. E. 182 (1925); Clarke Restaurant Co. v. Simmons, 29 Ohio App. 220, 163 N. E. 210 (1927); West v. Katsafanas, 107 Pa. 108, 162 Atl. 685 (1932); Temple v. Keeler, 238 N. Y. 344, 144 N. E. 635 (1924).

[42] 103 N. J. L. 464, 135 Atl. 805 (1927).

> the standard of liability is the failure to use that reasonable care which the circumstances require."

Later in the opinion, it was said in regard to the Uniform Sales Act:

> "We find no suggestion that a qualified transfer of food for limited purposes as hereinbefore indicated is to be transformed into a sale within the intendment of the act."

Most of the cases denying an implied warranty in the case of food served in a restaurant relied on the following excerpt from Beal's *Innkeepers*:[43]

> "The title to food never passes as a result of the ordinary transaction of supplying food to a guest; or, as it was quaintly put in an old case 'He does not sell but utters his provisions.' "

When the transaction between the owner of a restaurant and a guest is considered as a sale, an argument often advanced is that under modern conditions the old distinction between a "sale" and an "utterance" has disappeared.[44] Another argument advanced is the existence of a line of cases holding that the serving of certain prohibited foods is a sale of those foods.[45] In *Temple v. Keeler*[46] the court said in holding the serving of food to be a sale:

> "Apart, however, from Race v. Krum, we would still be compelled to reach the same result by an authoritative decision. Even in construing a criminal statute we have held that a hotel keeper who places before the guests at dinner partridges sells the birds, although the guests paid a total sum for board and lodging."

No Mississippi case in this division has been found, but in *Skermetta v. State*[47] the court held that wine served with a dinner to boarders who paid seventy-five cents a day for board, constituted a sale of the wine, and would convict the defendant of selling intoxicating liquors. The analogy between this case and the case mentioned in *Temple v. Keeler* is striking.

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[43]BEAL, INNKEEPERS, § 169.

[44]Heise v. Gillette, 85 Ind. App. 551, 149 N. E. 182 (1925).

[45]Temple v. Keeler, 238 N. Y. 344, 144 N. E. 635 (1924); Friend v. Childs Dining Hall, 231 Mass. 65, 120 N. E. 407 (1918); West v. Katsafanas, 107 Pa. 108, 162 Atl. 685 (1932); Clark Restaurant Co. v. Simmons, 29 Ohio App. 220, 163 N. E. 210 (1927); Mix v. Ingersoll Candy Co., 83 Cal. App. 84, 49 P. (2d) 877 (1935).

[46]238 N. Y. 344, 144 N. E. 635 (1924).

[47]107 Miss. 429, 65 So. 502 (1914).

There is another line of cases denying an implied warranty not so much on the lack of a sale as on the general theory that the owner of a restaurant is not to be held liable as an insurer.[48] In *Valeri v. Pullman Co.*[49] it was said:

> "But whether or not the transaction in question was a sale seems to be immaterial . . . .
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> "In my opinion there is no well-considered authority and no public policy which afford any justification for imposing upon the defendant the absolute liability of an insurer of its food, and I deem that the only obligation of the defendant, or any keeper of a restaurant or inn, is to exercise the reasonable care of a prudent man in furnishing and serving food."

Alabama does not recognize the existence of an implied warranty but states the rule thus:[50]

> "In this state a limited warranty is recognized, viz: That the food served is of the class generally accepted as fit for human consumption, and that in the selection and preparation of same the keeper has exercised the degree of care injoined by law."

An interesting case is that of *Cushing v. Rodman*,[51] decided in 1936 by the United States Court of Appeals for the District of Columbia. That case was a suit based on an implied warranty of wholesomeness of food served in a restaurant. Plaintiff ordered from defendant a dinner, and was served rolls as a part thereof. One of the rolls contained a pebble which caused the injury for which the plaintiff sues. The defendant had bought the rolls from a bakery.

The court held that the rolls belonged to the class of canned or sealed foods, and so was called upon to decide two questions. First, whether an implied warranty existed where food was served in a restaurant; and second, if the warranty existed, did it apply to articles of food which the owner of the restaurant bought elsewhere and was unable to inspect?

In this case the court decided in answer to the first question that an implied warranty did exist. The decision was not placed on the narrow ground that the transaction involved was necessarily a sale, but on the ground that the relationship between the parties

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[48] Valeri v. Pullman Co., 218 Fed. 519 (S. D. N. Y. 1914); Travis v. L. & N. Ry. Co., 183 Ala. 415, 62 So. 851 (1913).
[49] 218 Fed. 519 (S. D. N. Y. 1914).
[50] C. C. Hooper Cafe Co. v. Henderson, 223 Ala. 579, 137 So. 419 (1931).
[51] 82 F. (2d) 864 (D. C. App. 1936).

was at least contractual in its nature, and enough to support an implied warranty, especially when that warranty represented an obligation generally understood by both parties—that of serving wholesome food. Nor is this the only case in which courts have upheld an implied warranty without actually deciding that the transaction involved was a sale.[52] The contractual nature of the relationship between the owner of the restaurant and his guest is the basis of these holdings.[53] In answer to the second question, the court held that the implied warranty existed without respect to whether the defendant could inspect the food.

The writer is of the opinion that the interest of justice could best be served by applying the same rule of law to all cases in which a consumer purchases directly from either a retail dealer or restaurant keeper, and without respect to whether the food is sealed.

In all cases of the sale of food by a restaurant keeper to a guest, where the transaction was held to be a technical sale, the same law is applied as it applied in cases where a consumer purchases open food from a retail dealer.[54] Also, those cases holding that an implied warranty for fitness for food exists in the case of canned or sealed foods bought in reliance on the skill or judgment of the retail dealer are applying the same law in those cases as is applied in the case of open food purchased in reliance on the dealer's skill or judgment.[55] The case of *Cushing v. Rodman*[56] came close to applying the same law to the sale of goods to an ultimate consumer by either a retail dealer or restaurant keeper irrespective of the type of food sold, but did not go quite so far, as the implied

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[52]Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N. E. 407 (1918).

[53]In 1 WILLISTON, SALES (2d ed. 1924) § 242b, it is said: "Even though the transaction is not a sale, every argument for implying a warranty in the sale of food is applicable with even greater force to the serving of food to a guest or customer at an inn or restaurant. The basis of implied warranty is justifiable reliance on the judgment or skill of the warrantor, and to charge the seller of an unopened can of food for the consequences of the inferiority of the contents of the can, and to hold free from liability a restaurant-keeper who opens the can on his premises and serves its contents to a customer, would be a strange inconsistency. A sale is not the only transaction in which a warranty may be implied."

[54]Temple v. Keeler, 238 N. Y. 344, 144 N. E. 635 (1924); Mix v. Ingersoll Candy Co.. . . . . Cal. . . . , 49 P. (2d) 877 (1935); Heise v. Gillette, 85 Ind. App. 551, 149 N. E. 182 (1925); S. H. Kress & Co. v. Ferguson, ... Tex. . . . , 60 S. W. (2d) 817 (1933); Clarke Restaurant Co. v. Simmons, 29 Ohio App. 220, 163 N. E. 210 (1927); Smith v. Carlos, 215 Mo. App. 488, 247 S. W. 468 (1923); West v. Katsafanas, 107 Pa. 108, 162 Atl. 685 (1932).

[55]Cleary v. First Nat. Stores, ... Mass. . . . , 196 N. E. 868 (1935); Griffin v. James Butler Grocery Co., 108 N. J. L. 92, 156 Atl. 636 (1931).

[56]82 F. (2d) 864 (D. C. App. 1936). See, also, S. H. Kress & Co. v. Ferguson, ... Tex. . . . , 60 S. W. (2d) 817 (1933) and Clarke Restaurant Co. v. Simmons, 29 Ohio App. 220, 163 N. E. 210 (1927), where the courts seem to have applied the same law to all three divisions of this article.

warranty of the restaurant owner was not based on a holding that the transaction was a sale.

There is no logical reason for holding that cases involving a sale by a retailer of canned goods to a customer who relies on the skill or judgment of the retailer do not also involve an implied warranty that those canned goods will be wholesome. It is argued that, in the case of canned goods, the retailer has no opportunity of inspection, and therefore should be held only for actual negligence.[57] But it is still true that the retail dealer is in a better position to select the goods of a reliable manufacturer than is the consumer, and the consumer generally relies on the dealer to supply him with pure foods, canned or otherwise. Furthermore, a retail dealer is in a better position to demand pure foods of the manufacturer than is the consumer. Retail dealers can exert economic pressure on any manufacturer who sells unreliable products to a much greater extent than can a consumer. Also, in many states, where it is held that no suit on any implied warranty may be maintained without privity of contract, the retail dealer has an easier remedy against the manufacturer than has the consumer. If a suit in negligence is sufficient relief in the case of canned foods, why should any other form of relief be given in the case of open foods?[58]

As to suits against a restaurant owner, it is submitted that these transactions all involve actual sales of the food. Certainly in modern restaurants and hotels, the old theory of an "utterance" of food will no longer apply.[59] The guest today orders the food he wants and each dish is served exclusively to him. The law should not hold the transaction to be something foreign to the intention of the parties, and, when food is served in the average restaurant or lunch room of today both the customer and the owner of the restaurant consider that food has been sold by the one to the other. The owner of the modern restaurant or cafe believes that his customer has a perfect right to take with him the uneaten portion of the food served him.[60]

For these reasons it is contended that when a customer purchases food for human consumption from a retail dealer or restaurant owner, expressly or by implication making known to the seller the particular purpose for which the food is intended, and it

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[57]Walden v. Wheeler, 153 Ky. 181, 154 S. W. 1088 (1913); Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933).

[58]Cushing v. Rodman, 82 F. (2d) 864 (D. C. App. 1936).

[59]Heise v. Gillette, 85 Ind. App. 551, 149 N. E. 182 (1925); S. H. Kress & Co. v. Ferguson, ... Tex. . . . , 60 S. W. (2d) 817 (1933).

[60]Based on questions asked to various restaurant and cafe owners in the vicinity. In every case the restaurant owner said he *sold* the food to his customers, and that the customers had the right to take away with him any part of it.

appears that the buyer relied on the skill or judgment of the seller, there should be an implied warranty that the food will be wholesome and fit for consumption. And this rule should apply to all foods for human consumption, canned, sealed, or otherwise.

Charles R. Galloway

The Effect of Physical Cancellation of an Instrument Creating a Leasehold Interest

Assume that there has been a transmutation of possession under a contract of lease for a term required by the Statute of Frauds to be in writing or having such a term to run and a physical cancellation or destruction of the lease in pursuance of an oral agreement between the parties thereto. Under such circumstances what is the effect of the cancellation upon the relationship of the parties? What is the effect upon the executory covenants in the lease?

While there has been some difference of opinion among the authorities as to the scope and meaning of the word "lease," it is universally agreed that from a practical or a technical standpoint the word has a double significance, the effect of a lease being to create two definite relationships between the parties to it; i.e., privity of contract and privity of estate.[1] It therefore becomes necessary to consider separately the effect of an oral cancellation upon each of these aspects of a lease.

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Does the oral cancellation have the effect of creating a surrender of the estate?

The early English view was that a cancellation by agreement of the parties had the effect of surrendering the estate even if made orally but this view was discarded after passage of the Statute of

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[1]While some definitions of a lease refer only to the transfer of an interest in land, most authorities recognize the double significance. In Davidson v. Minnesota Loan and Trust Co., 158 Minn. 411, 197 N. W. 833, 834 (1924), it is said, "A lease is an executory contract and a present conveyance, and creates a privity of contract and a privity of estate." Taylor, Landlord and Tenant (5th ed. 1904) § 12: "Independently of the idea of contract, a lease also possesses the property of passing an interest and hence partakes of the nature of an estate." Reynolds v. Hanna, 55 Fed. 783 (C. C. 1800); Howard v. Manning, 79 Okla. 165, 192 Pac. 358, 360 (1920): "A lease is a contract between the lessor and lessee, vesting the latter with a right to possession of the land for a term of years. It becomes an estate when vested in possession." Tiffany, Landlord and Tenant (1920) § 39; Thompson, Real Property (1924) §§ 104, 5; 5 Words and Phrases (1904) 4043; 16 R. C. L. 530, § 2; 35 C. J. 951, § 2.

Frauds.[2] Today it is a general rule of law that a lease required by the Statute to be in writing may not be surrendered by an oral agreement between the parties[3] unless such oral agreement is executed.[4] As to what constitutes "execution" sufficient to satisfy the rule there seems to be a wide difference of opinion. In a recent Colorado case[5] it is merely said that it is a question for the jury; but usually this proposition is treated as a question of law and the courts undertake to describe for themselves what is necessary for a satisfaction of the rule.[6]

On the one extreme, it has been held that a lease under seal was not terminated by the surrender of the premises by the lessee to the lessor and the payment of the rent then due, in pursuance of an oral agreement that the premises should be surrendered up and the lease cancelled, even though a new lease had been made to third parties and possession taken by them and the rents paid to and received by the lessor.[7] Notwithstanding this, the lessor was allowed to recover rent from the original lessee in the action.

On the other extreme, it has been held that even the oral changing of the rent coupled with a cancellation of the lease was a sufficient "execution" to affect a valid surrender.[8] Where the lessee

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[2]SMITH, LANDLORD AND TENANT (1856) § 225.

[3]Bonneti v. Treat, 91 Cal. 223, 27 Pac. 612 (1891); Leavitt v. Stern, 159 Ill. 526, 42 N. E. 869 (1896); Burgett v. Loeb, 43 Ind. App. 677, 88 N. E. 346 (1909); Heller v. Dailey, 28 Ind. App. 555, 63 N. E. 490 (1901); Goldsmith v. Barron, 288 Mass. 176, 192 N. E. 509 (1934); Stadler v. Ciprian, 265 Mich. 252, 251 N. W. 404 (1933); Lawrence v. Ravaport, 213 Mich. 358, 181 N. W. 1011 (1921); Stern v. Thayer, 56 Minn. 93, 57 N. W. 329 (1894); Longacre v. Longacre, 132 Mo. App. 192, 11 S. W. 855 (1908); Rowan v. Lytle, 11 Wend. 116 (N. Y. 1836); Bailey v. Wells, 8 Wis. 141, 76 Am. Dec. 233 (1858); Johnstone v. Huddlestone, 106 Eng. Rep. 1302, 4 B. & C. 922 (K. B. 1825); Mollett v. Brayne, 2 Eng. Rep. 103 (N. P. 1809).

[4]Ford v. Miller, 141 Ark. 433, 232 S. W. 604 (1921); People's Express Inc. v. Quinn *et al.*, 235 Mass. 156, 126 N. E. 423 (1920); Wahl v. Hinchey, 99 Mo. App. 65, 72 S. W. (2d) 497 (1934); Elizabeth Trust Co. v. Chong, 14 N. J. L. 129, 176 Atl. 181 (1935); Miller v. Demis, 68 N. J. L. 320, 53 Atl. 394 (1902); Lott v. Chaffee, 46 R. I. 242, 126 Atl. 559 (1924); Earlington Realty Co. v. Berkow, 3 N. J. Misc. Rep. 444, 128 Atl. 605 (1925); Pomerantz v. Dunn, ... N. J. ...., 154 Atl. 429 (1931); Porskievies v. Borough of Ali Highlands, ... N. J. ...., 181 Atl. 394 (1902); Ciambelli v. Porter, 177 Atl. 145 (R. I. 1935) (an agreement held executed but not clear whether by operation of law or fact).

[5]Ruple v. Taughenbaugh, 72 Colo. 171, 210 Pac. 72, 73 (1922): "Any agreement between landlord and tenant, manifesting an intention to terminate a lease, which is unequivocally acted upon by each party effects its cancellation; but the acceptance of a surrender is a question of fact for the jury in an action for rent."

[6]Steel v. Thompson, 59 Cal. App. 191, 210 Pac. 422 (1921); Larson v. Taylor, 55 Cal. App. 370, 203 Pac. 422 (1921); Ruple v. Taughenbaugh, 72 Colo. 171, 210 Pac. 72 (1922); Beidler v. Fish, 14 Ill. App. 29 (1883); Hooks v. Forst, 165 Pa. 238, 30 Atl. 846 (1895); People's Express Inc. v. Quinn *et al*, 235 Mass. 156, 126 N. E. 423 (1920).

[7]Schieffelin v. Carpenter, 15 Wend. 1400 (N. Y. 1836).

[8]Bowman v. Wrights, 65 Neb. 661, 91 N. W. 580 (1902).

had never gone into possession, in at least two cases,[9] a parol agreement to surrender coupled with a cancellation of the lease has been held effective.[10]

What will be the effect where the only acts done by the parties is the physical cancellation of the lease? Authority on this question is scarce and it may be helpful to consider briefly certain cases dealing with physical cancellation of a deed. In the case of *Hatch v. Hatch*[11] the Massachusetts court laid down the rule that an alteration made as a result of an oral agreement between the agent of the deceased grantor and the grantee in the descriptive portion of the deed would not avoid the deed. This court rejected the contention made by the party seeking to discredit the deed that the same rules applied with equal strictness to deeds as did to negotiable instruments. The court held that while the credit of the deed may have been to some extent impaired, the jury could still examine the deed and consider its force, but that the deed was entirely satisfactory for the purpose of showing that the title to the land descended to the grantee from the deceased grantor.

A much more extreme view was taken by an Alabama court in the case of *King v. Chrocheron*,[12] in which there had been no change of possession under the deed. The original grantee had written across the face of the deed: "I hereby return and relinquish the within deed to John M. Terry [second grantee] and authorize the same to be transferred upon record." The memorandum was then signed and sealed. Shortly thereafter the deed was transferred upon record in accordance with the above authorization and the parties at all times had treated the deed as surrendered, yet the court held that there was not a valid surrender.

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[9]Hook v. Forst, 165 Pa. 238, 30 Atl. 846 (1895); Beidler v. Fish, 14 Ill. App. 29 (1883).

[10]It will be of interest to compare also the following: Steel v. Thompson, 59 Cal. App. 191, 210 Pac. 430 (1922). In Larsen v. Taylor, 55 Cal. App. 370, 203 Pac. 422 (1921), an oral agreement was entered into by the landlord and tenant to effect a surrender and the tenant abandoned and the landlord resumed possession. This was held an executed agreement, the court saying that the resumption of the premises by the landlord was a sufficient act to presume the agreement for surrender accepted. On the other hand, in Friedburg v. Parsons, 3 N. J. Misc. 473, 128 Atl. 788 (1925), it is said, "A surrender of a lease by operation of law results from acts which imply mutual consent independently of the expressed intention of parties that their acts shall have that effect." In People's Express Inc. v. Quinn *et al.*, 235 Mass. 156, 126 N. E. 423 (1920), it was held that there can be no surrender by an oral agreement unless the premises are abandoned by the tenant. In Beidler v. Fish, 14 Ill. App. 29 (1883), and in Hooks v. Forst, 165 Pa. 238, 30 Atl. 846 (1895) (oil and gas lease), it was held that a cancellation made before possession of the premises was taken under the lease would be effective.

[11]9 Mass. 307, 6 Am. Dec. 67 (1812).

[12]14 Ala. 822 (1848).

The rule almost universally followed is that where there has been a delivery of a deed and the title has passed to the grantee named in it, title cannot be revested in the grantor by a cancellation of the instrument or a destruction of it by mutual consent of the parties.[13] Some jurisdictions give effect to a cancellation of this type by disallowing any secondary evidence to be introduced of the instrument so cancelled or destroyed.[14] In *Farar v. Farar*[15] the theory upon which these types of holdings have been predicated is set forth:

> "The true ground on which these decisions are to be supported is, that the grantee, having voluntarily and without any misapprehension or mistake consented to the destruction of the deed with a view to revest title, neither he nor any other person claiming title derived from him is permitted to show the contents of the deed so destroyed, by parol evidence that the land ever passed, the title is to be considered as having always remained in the grantor."

Other courts have decided against the grantor on the basis of estoppel.[16] In a few states the return of the instrument to the grantor or its destruction with the intention of revesting the ownership in him is said to divest the grantee of the equitable title but not of the legal title,[17] and in two states of legal title also.[18]

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[13]White v. Moffett, 108 Ark. 490, 158 S. W. 505 (1913); Weygant v. Bartlett, 102 Cal. 224, 36 Pac. 417 (1896); Gilbert v. Buckley, 5 Conn. 262, 13 Am. Dec. 57 (1824); Chessman v. Whittemore, 23 Pick. 231 (Mass. 1839); Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67 (1812).

[14]Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638 (1857); Gugins v. Gordner, 10 Mich. 523 (1862); Potter v. Adams, 125 Mo. 118, 28 S. W. 490 (1894); Emery v. Dana, 76 N. H. 483, 84 Atl. 976 (1912); Arington v. Arington, 114 N. C. 115, 19 S. E. 145 (1894).

[15]4 N. H. 191 (1827).

[16]Whisenant v. Gordon, 101 Ala. 256, 13 So. 914 (1893); Brown v. Brown, 142 Iowa 125, 120 N. W. 724 (1909); Rowe v. Eppling, 163 Ky. 381, 173 S. W. 801 (1915); Conn. v. Dudley, 10 Mass. 403 (1813); McAlister v. Mitchner, 68 Miss. 673, 9 So. 829 (1891); Dykes v. Spangler, 35 Ohio St. 119 (1848); Stanley v. Epperson, 45 Tex. 645 (1877).

[17]Russell v. Meyer, 7 N. D. 535, 75 N. W. 262 (1898). In Hays v. Dean, 182 Iowa 619, 164 N. W. 770 (1917), where an unrecorded deed to a husband was lost and a subsequent deed was given by the original grantee to the wife with the husband's consent, it was held that the wife was the equitable owner, and that the husband's heirs were estopped from asserting any title under the lost deed. In Ely v. Brewer, 182 Ala. 396, 62 So. 742 (1913), a deed had been delivered and recorded and was returned to one of the grantors who had never received his pay for his conveyance. He erased his name from the deed and gave a new deed for his interest to a third party, all with the consent of the original grantee. It was held that while the legal title still remained in the original grantee, the third party took equitable title. The court observed that the vendor's lien undoubtedly passed by the second deed.

[18]Hall v. Wright, 137 Ky. 39, 127 S. W. 516 (1910); Respass v. Jones, 102 N. C. 5, 8 S. E. 770 (1889); Huffman v. Huffman, 1 Lea 491 (Tenn. 1878).

Insofar as direct authority upon the effect of cancelling a lease is concerned it is almost unanimously agreed that there is no surrender of the leasehold estate (if no other acts are involved).[19] Two cases which hold there is a cancellation rely strictly upon the fact that the lessee never went into possession.[20] Where the lessee had gone into possession, however, there are three cases directly holding that there was no surrender.[21] In *Rowan v. Lytle*,[22] Lytle had demised to Webster a farm for a term of eight years at an annual rent of $55; and on the same day Webster underlet the same with the assent of Lytle to Rowan. Rowan's term expired April 1, 1830. For some time previous to the time of expiration of his lease he pretended to have some interest in the land independently of the lease. On April 14th Webster delivered his copy of the lease to the lessor and it was cancelled and destroyed. After this a rental of $65 was demanded by Lytle of Rowan, who refused to pay or to get off the premises. The court held that the interest of the original lessee was not divested by the cancellation by reason of the Statute of Frauds. In *Brewer v. Building Loan Association*[23]

> "one *F* desiring a lease of rented premises and he and the tenant wishing a cancellation of the existing lease which expired on April 30th, the landlord refused, on the ground that the rent for the current month was unpaid, but on payment thereof on Jan. 29th he indorsed 'cancelled' across a copy of the lease held by the tenant, saying that he would cancel the copy and hold the original."

The court held that whether or not this amounted to a surrender was a question of fact for the jury. On appeal the appellate court said that as nothing was done by the parties in pursuance of the transaction of Jan. 29th it was plainly ineffective as a surrender, and affirmed the case. In the important English case on the sub-

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[19]Brewer v. Building & Loan Association, 166 Ill. 221, 46 N. E. 752 (1897); Rowan v. Lytle, 11 Wend. 616 (N. Y. 1834); Lord Ward v. Lumley, 5 H. & N. 87 (Ex. 1860) (important English case on the point). *Cf.* Barth v. Women's Club, 254 Mich. 270, 236 N. W. 778 (1931) (tenant failing to surrender the premises in writing before the expiration of a five year lease held liable for rent stipulated therein. A verbal agreement for surrender alleged but none proved). But *cf.* Smith v. Devlin, 23 N. Y. 363 (1861) (New York Statute of Frauds held to apply to unexpired portion of the term, rather than to its original length).

[20]Hook v. Forst, 165 Pa. 238, 30 Atl. 846 (1895); Beidler v. Fish, 14 Ill. App. 29 (1883).

[21]Brewer v. Building & Loan Association, 166 Ill. 221, 46 N. E. 752 (1897); Rowan v. Lytle, 11 Wend. 616 (N. Y. 1834); Lord Ward v. Lumley, 5 H. & N. 87 (Ex. 1860); *cf.* Barth v. Women's Club, 254 Mich. 270, 236 N. W. 778 (1931).

[22]11 Wend. 616 (N. Y. 1834).

[23]166 Ill. 221, 46 N. E. 752 (1897).

ject,[24] an action of debt on a demise so cancelled was brought and a defense interposed that there had been such a cancellation, one Maude presenting the argument for the landlord as follows:

> "These authorities show that this action is not founded on the deed, but on the demise; and that though the cancelling of a deed will annul all action in which it is necessary to declare upon the deed itself, yet the cancelling does not divest the estate of the lessee, or destroy the lessor's right of action for the rent, which is founded on privity of estate and not on privity of contract."

It was apparently on this theory that he was allowed to recover.[25] This case implies rather strongly that executory covenants will be destroyed by such a cancellation.

It is quite possible that some of the jurisdictions which have held that the cancellation of a deed has the effect of re-transferring property directly or indirectly would reach a similar holding in connection with a lease. But be that as it may, clearly the majority of the cases hold there is no surrender.[26]

II

If it is held that there is a surrender, of course the contrac-

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[24]Lord Ward v. Lumley, 5 H. & N. 87 (Ex. 1860).

[25]In deciding the case Watson, B., declared, "Where the contract arises from the deed itself, and the deed is destroyed, no action can be maintained in respect to it. But the case is very different here, upon the execution of the deed, there passed from the lessor to the lessee an estate which was not affected by the cancellation of the lease. The lessee holds the estate subject to the rent which is incident to the reversion in the lessor. According to the argument of the defendant, he may hold the estate without payment of rent. But the authorities are clear that the cancelling of a deed does not divest the estate of the lessee, or deprive the lessor of his right of action on the demise." *Id.* at 93. Martin, B., added, "Here the question is whether the simply cancelling of a lease destroys the lessor's right of action for the recovery of rent. I am of the opinion that it does not, because the cancelling of a lease does not destroy the estates already vested or their incidents." The doctrine of this case was established in the case of Roe v. The Archbishop of York, 6 East. 86 (K. B. 1805). It was affirmed in Lord Ward v. Lumley, *supra*, and followed in Perrott v. Perrott, 14 East. 423 (K. B. 1811); Doe *ex dem.* Lewis v. Bingham, 4 B. & Ald. 672 (K. B. 1821), where it was said, "Here the action is founded on the privity of estate, which is quite independent of the contract which the parties entered into by the lease." See, also, Thomas v. Falmouth, 9 M. & W. 469 (Ex. 1842): "Notwithstanding the cancelling of the lease it may be given in evidence to shew that an estate passed."

[26]*Cf.* Mallory v. Stodder, 6 Ala. 801 (1844); King v. Chrocheron, 14 Ala. 822 (1848); Gilbert v. Buckley, 5 Conn. 262, 13 Am. Dec. 57 (1824); Jordan v. Pollock, 14 Ga. 145 (1853); Brewer v. Nat. Union Building Ass'n, 166 Ill. 221, 46 N. E. 752 (1897); Connely v. Doe, 8 Blackf. 320 (Ind. 1846); Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67 (1812); Holbrook v. Tirrell, 9 Pick. 105 (Mass. 1829); Chessman v. Whittemore, 23 Pick. 231 (Mass. 1839); Whitton v. Smith, Freem. Ch. 231 (Miss. 1839); Tibeau v. Tibeau, 19 Mo. 78, 59 Am. Dec. 329 (1853); Jackson v. Anderson, 4 Wend. 474 (N. Y. 1830); Raynor v. Wilson, 6 Hill 469 (N. Y. 1844); Schutt v. Large, 6 Barb. 373 (Ark. 1849); Parker v. Kane, 4 Wis. 1, 65 Am. Dec. 283 (1854).

tual element will be avoided. In the many jurisdictions which would hold no surrender of the leasehold, however, the question still remains as to what effect is had upon the covenants in the deed or lease. It appears that the courts have not clearly explained the effect of a cancellation of the instrument upon the executory covenants in a lease or deed. Under the simplest contract rules an attempt to surrender by cancelling the lease should result in avoiding the executory covenants in the writing.[27] It has been seen that a lease or deed is both a contract and a conveyance and the courts have frequently dealt with the instruments as if the two elements were severable and susceptible of independent treatment; thus, in the case of a lease which is defectively executed, the courts have unhesitatingly held that while the lease may be ineffective to pass an estate that nevertheless it is a perfectly sound contract, which may be sued upon when breached.[28] The rule has long prevailed in the law of alterations (authorized or unauthorized) that the executory covenants may be destroyed thereby, but that the altered instrument was still effective to pass an estate.[29] Where contracts

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[27] 2 WILLISTON, CONTRACTS (1920) § 1226: "The discharge of a contract by parol agreement of the parties would seem on principle to require the same elements of mutual consent and consideration that are necessary for the formation of a simple contract and this is the general rule. If the parties to a bilateral contract agree to rescind it there is no difference in regard to consideration whether the agreement to rescind is made before or after the breach of the original contract, so long as neither party has completely performed or been discharged from his obligation. The promise of one party to forego his rights under the contract is sufficient consideration for the promise of the other to forego his rights. Mutual agreement need not be express but may be inferred from the circumstances . . . . "

[28] Schloss v. Brown, 13 Ohio App. 294 (1920); Wineburgh v. Toledo Corp., 125 Ohio St. 219, 181 N. E. 20 (1932); Richardson v. Bates, 8 Ohio St. 257 (1858); Earlington v. Berkow, 128 Atl. 605 (N. J. 1925) (privity of contract held terminated without privity of estate being terminated); Sperry v. Miller, 8 N. Y. 336 (1854) (lessor held entitled to rent because contract in lease had become a personal debt though the term was surrendered as agreed); Folsom v. Sperrin, 2 Cal. 603 (1852). In Schloss v. Brown, *supra*, it was held that a lease, though not attested as required by the Statute of Frauds is good between the parties as a contract which may be sued upon. The court said, "There is a well settled rule of law that the provision that 'no action shall be brought on a contract within the Statute of Frauds' does not render the contract entirely void, but merely unenforceable. It is valid for all general purposes except for sustaining an action at law for its breach or a suit in equity for its specific performance when the defense of the Statute is properly taken."

[29] "Such alteration does not divest the original grantee of the title, or revest the title in the grantor, though done by mutual consent with a view to such object." 2 AM. JUR. § 37, citing Tibeau v. Tibeau, 19 Mo. 78, 59 Am. Dec. 329 (1853). The authorities are agreed that a party responsible for the alteration of a deed cannot maintain an action on its covenants. Sharpe v. Orme, 61 Ala. 263 (1878); Chessman v. Whittemore, 23 Pick. 231 (Mass. 1839); Woods v. Hildebrande, 46 Mo. 284, 2 Am. Rep. 513 (1870); Smith v. McGowan, 3 Barb. 404 (Ark. 1848). In Lewis v. Payne, 8 Cow. 71, 81 Am. Dec. (N. Y. 1827), it was held that where there was an estate which might exist without a deed, such as a fee simple estate in land, and where the land was conveyed by deed, the fraudulent alteration of the deed would destroy it but not the estate covered by the deed. *E.g.*, "if the deed be a quitclaim the

or writings of other kinds have been declared void under the Statute of Frauds the courts have allowed recovery by action of use and occupation for reasonable rent.[30] The contract of lease or deed is usually allowed in evidence to prove what a reasonable rent should be.[31] All of the necessary elements to discharge the executory covenants are certainly present where a parol agreement has been made in an attempt to surrender in the type of factual situation under discussion. Mr. Williston, in dealing with the nature of a lease, says:[32]

> "An ordinary lease is partly a bilateral contract. The main part of the consideration furnished by the lessor is furnished by him when the lease is made. At this time he conveys to the lessee an estate for years. The lessor, however, ordinarily makes executory covenants besides. On the part of the lessee, the consideration is wholly executory, consisting of covenants to pay rent and render such other performance as the lease requires of him. As an original question a lease might well have been regarded as a wholly bilateral agreement by which the lessor instead of making a conveyance, promises a continuing permission to occupy the premises. This is the way in which a lease is regarded in the Civil law. If it were thus regarded there would seem no reason why the principles of dependency applicable to ordinary bilateral contracts should not likewise be applicable to leases. In fact they are not thus applicable to American law."

Mr. Williston explains that the principles are not applicable probably because the law governing leases had been dealt with in connection with the law of real estate and such law became settled before the law of mutually dependent promises in relation to con-

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party loses nothing; but if it contain covenants, he loses all right to action on these but title is not divested from him." *Cf.* Collins v. Collins, 51 Miss. 311, 24 Am. Rep. 632 (1875), to the effect that an alteration made after the deed of trust acknowledged and recorded by consent of the parties was invalid against the third persons concerned but was good in its original form as against the parties to it; and further, it might be good against the original parties in its altered form.

[30] In Folsom v. Perrin, 2 Cal. 603 (1852) the court held where the lease sued upon was void under the statute that no action could be had thereon but if there had been a count for use and occupation it might have been different. *Cf.* Ames, *Assumpsit for Use and Occupation* (1913) LECTURES ON LEGAL HISTORY 167.

[31] Farar v. Burns, 18 Ala. App. 350, 92 So. 236 (1922); Offeman v. Robertson Cole Studios, 80 Cal. App. 1, 251 Pac. 830 (1926); Kutzner v. Steart, 215 Mich. 270, 183 N. W. 905 (1921); Rhea v. Meyers, 11 Mich. 140, 69 N. W. 239 (1896); Emery v. Smith, 46 N. H. 151 (1865); Van Horn v. Van Horn, 20 Atl. 826 (N. J. Ch. 1890); Capers v. Stewart, 3 Tex. Civ. App. 355 (1877).

[32] 2 WILLISTON, CONTRACTS (1936) § 890.

tracts.[33] If such law were applicable it would help to clear up that great problem in connection with leases as to where the loss should fall when premises leased are destroyed or damaged. Whether or not we agree with Mr. Williston that the laws of dependency in contracts should apply to leases, it is difficult to understand why that part of a lease which is admitted to be a contract should not be subject to the law of contracts. So to deal with the contractual element of a lease would not result in a far-reaching and undesirable upheaval in legal principles. On the contrary, the step could be taken conveniently, without injustice and in accordance with reason and logic. The conclusion, therefore, would seem warranted that even though the estate is not surrendered by the attempted cancellation, all the executory contractual elements of the instrument should be avoided. In most cases this would leave no remedy available to the covenantee, but in case of rent the lessor should be able to recover a reasonable amount in an action for use and occupation.[34]

Rowan Thayer Thomas

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[33] 2 WILLISTON, CONTRACTS (1936) § 890.

[34] Folson v. Perrin, 2 Cal. 603 (1852); Ames, *Assumpsit for Use and Occupation* (1913) Lectures on Legal History 167; AMES, SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY ( ) 299; *cf.* MISS. CODE ANN. (1930) § 2177: "Where there is no contract, or where the agreement is not in writing, a landlord may maintain an action to recover a reasonable satisfaction for the use and occupation of the lands held and enjoyed by another. And if on the trial of such action there appear in evidence any demise or agreement the plaintiff shall not on that account be non-suited, but may make use thereof as evidence of the amount to be recovered."

RECENT DECISIONS

FEDERAL COURTS—JURISDICTION OF SUITS ARISING UNDER THE LAWS OF THE UNITED STATES—ACTION AGAINST NATIONAL BANK TO RECOVER STATE TAXES.

The assets of the First National Bank *of* Meridian, a national banking association, were conveyed to the First National Bank *in* Meridian under a contract, whereby the grantee covenanted to pay all the debts of the grantor, including certain taxes owed the State of Mississippi, levied under a Mississippi statute.[1] Upon the failure of grantee to pay said taxes, the State Tax Collector instituted an action in the state court to recover a money judgment thereon. As the state tax was levied under the power granted by a federal law,[2] the case was removed to the federal court upon the ground that a federal question was involved by implication. Jurisdiction was taken and the complaint dismissed on its merits; decision affirmed by the Circuit Court of Appeals. On certiorari to the United States Supreme Court, HELD: The action had its genesis in the state statute and was based upon the contract between the banks, so that no federal question was involved. *Gully, State Tax Collector v. First National Bank in Meridian*, ... U. S. ... , 57 Sup. Ct. 96, 81 L. ed. 44 (1936).

The important words in the jurisdictional section of the United States Code[3] germane to the present issue are "arises under." Few subjects are involved in greater perplexities than the question as to when a suit arises under the laws of the United States. Many criteria have been laid down for determining when a federal question is involved,[4] but even these do not clarify the subject sufficiently.

It is fundamental that there be a real and substantial controversy respecting the validity, construction or effect of a federal law,[5] and the Supreme Court now insists that the federal law be the real basis and essential element of the action.[6] The federal element in the case cannot be merely in-

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[1] MISS. CODE ANN. (1930) § 3138.

[2] 12 U. S. C. A. § 548. "The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with . . . . "

[3] 28 U. S. C. A. § 41 (1): "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the constitution or laws of the United States, or treaties made, or which shall be made under their authority . . . . "

[4] McGoon v. Northern Pac. R. R., 204 Fed. 998 (N. D. 1913).

[5] Starin v. New York, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. ed. 388 (1885); Hanford v. Davies, 163 U. S. 173, 16 Sup. Ct. 1051, 41 L. ed. 157 (1896); Cuyhoga River Power Co. v. Northern Ohio Co., 252 U. S. 389, 40 Sup. Ct. 404, 64 L. ed. 626 (1919); First Nat. Bank v. Williams, 252 U. S. 504, 40 Sup. Ct. 372, 64 L. ed. 690 (1920); Mathers & Mathers v. Urschel, 74 F. (2d) 591 (C. C. A. 10th, 1935).

[6] L. & N. R. R. v. Mottley, 211 U. S. 149, 29 Sup. Ct. 42, 53 L. ed, 126 (1908); Puerto Rico v. Russell & Co., 288 U. S. 476, 53 Sup. Ct. 447, 77 L. ed. 903 (1933).

cidental to a determination of the local question of what the state had required and prescribed, if jurisdiction is to be retained.[7] Nor at the present time will mere reference to a federal statute or statutes in the complaint or declaration suffice to confer jurisdiction.[8]

In the instant case, it was contended that the action was one arising under the laws of the United States because the federal statute,[9] granting the states the power to tax a national banking association,[10] was involved by implication. In one of the leading decisions on this subject, Chief Justice Marshall stated that

> "when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of law or fact may be involved in it. The case of the bank is, we think, a very strong case of this description."[11]

This language probably suggests that a United States law, involved by implication, would be sufficient, but subsequent decisions of the Supreme Court have manifested a different conclusion, and the doctrine has been curbed by subsequent legislation.[12]

It is now well established that the federal law must give the right to be enforced and not the mere authority to establish it.[13] For,

> "A statute authorizing an action to establish a right is very different from one which creates a right to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case it necessarily involves such a controversy that the thing to be decided is the extent of the right given by the statute."[14]

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[7]Miller's Executors v. Swan, 150 U. S. 132, 14 Sup. Ct. 52, 37 L. ed. 1028 (1893).

[8]St. Paul M. & M. Ry. v. St. Paul & N. P. Ry., 18 Sup. Ct. 946, 42 L. ed. 1212 (1897). *Cf.* Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204 (1824); Pacific Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. ed. 319 (1884).

[9]12 U. S. C. A. § 548.

[10]Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. ed. 850 (1899); Bank of Calif. v. Richardson, 248 U. S. 476, 39 Sup. Ct. 165, 63 L. ed. 372 (1919).

[11]Osborn v. Bank of United States, 9 Wheat. 738, 820, 6 L. ed. 204, 224 (1824).

[12]Act of July 12, 1882, c. 290, § 4, 22 STAT. 162, 28 U. S. C. A. § 41 (16); Act of Jan. 28, 1915, c. 22, § 5, 38 STAT. 803; Act of Feb. 13, 1925, c. 229, § 12, 42 STAT. 936, 29 U. S. C. A. § 42.

[13]Blackburn v. Portland Gold Mining Co., 175 U. S. 571, 20 Sup. Ct. 222, 44 L. ed. 276 (1900); Shoshone Mining Co. v. Rutter, 177 U. S. 505, 20 Sup. Ct. 726, 44 L. ed. 864 (1900); Puerto Rico v. Russell & Co., 288 U. S. 476, 53 Sup. Ct. 447, 77 L. ed. 903 (1933).

[14]Brewer, J. in Shoshone Mining Co. v. Rutter, 177 U. S. 505, 510, 20 Sup. Ct. 726, 728, 44 L. ed. 864, 864.

This rule is applicable and upheld in principle by analogous decisions involving actions other than taxation of national banking associations.[15]

Puerto Rico v. Russell & Co.[16] was similar to the instant case in that the suit was brought to recover a tax, levied by a state legislature. In holding that no federal question was involved, the Court declared that "the federal nature of the right to be established is decisive; not the source of the authority to establish it." The principal case is undoubtedly in accord with this rule; and only more clearly illustrates the present tendency of the Supreme Court to limit strictly the jurisdiction of the federal courts.[17] Reasons for this tendency are strong, and we may expect the courts to limit the federal jurisdiction even more strictly in the future.

Chester H. Curtis

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[15]See for example, St. Paul M. & M. Ry. v. St. Paul & N. P. Ry., 18 Sup. Ct. 946, 42 L. ed. 1212 (1897) (fact that title to land in controversy derived from U. S. does not give jurisdiction); Blackburn v. Portland Gold Mining Co., 175 U. S. 571, 20 Sup. Ct. 222, 44 L. ed. 276 (1900) (title to land under and by virtue of U. S. patent presents of itself no federal question); H. C. Cook Co. v. Beecher, 217 U. S. 497, 30 Sup. Ct. 601, 54 L. ed. 855 (1910) (action on judgment in patent case is not action on patent, and confers no jurisdiction); Barnett v. Kunkel, 264 U. S. 16, 44 Sup. Ct. 254, 68 L. ed. 539 (1924) (fact that land in controversy was allotted Indian land, conveyed to plaintiff under federal law, afforded no federal question); Pliable Shoe Co. v. Bryant, 81 Fed. 521 (N. D. Calif. 1897) (specific performance of contract to assign patent was founded on contract, not on patent laws of U. S.); By-Products Recovery Co. v. Mabee, 288 Fed. 401 (Ohio, 1923) (specific performance of contract to assign patent, not involving infringment, gives no jurisdiction).

[16]288 U. S. 476, 53 Sup. Ct. 447, 77 L. ed. 903 (1933).

[17]Puerto Rico v. Russell & Co., 288 U. S. 476, 53 Sup. Ct. 447, 77 L. ed. 903 (1933).

EVIDENCE—WAIVER OF PLAINTIFF'S PRIVILEGE TO OBJECT TO PHYSICAL AND X-RAY EXAMINATION BY PHYSICIANS OF DEFENDANT'S SELECTION.

Plaintiff, seven year old girl, by her mother as next friend sued and recovered judgment against defendant bus company for injuries incurred in collision between an automobile in which plaintiff was riding and defendant's bus. Dr. *C* took X-ray pictures of plaintiff's body, which were introduced in evidence, and which Dr. *C* interpreted as showing a bone fracture, a crushed joint, etc. Three other physicians, experts at interpreting X-ray pictures, testified that Dr. *C's* X-rays were defectively taken and erroneously portrayed plaintiff's condition. Plaintiff did not take the stand, but, her mother consenting, she showed the court and jury her allegedly injured stomach and hip. Defendant then moved the court for permission to subject plaintiff's body to a physical and X-ray examination by wholly disinterested physicians. Motion was overruled because plaintiff had not consented thereto. HELD: Since the accuracy of Dr. *C's* X-ray pictures of plaintiff's body was sharply controverted by defendant, "and the alleged injured parts of the child's body were voluntarily exhibited to the jury, . . . appellee's personal immunity from examination by experts was waived," and the alleged injured parts of plaintiff's body "became subject to a reasonable . . . X-ray and physical examination by experts of the defendant's selection" under the court's supervision. Judgment affirmed as to liability, reversed as to amount of damages, and remanded for assessment thereof. *Dixie Greyhound Lines, Inc. v. Matthews*, . . . Miss. . . . , 170 So. 686 (1936).

In civil actions for personal injuries it is the general rule that the trial court has the discretionary power to compel the plaintiff to submit to a physical examination for the purpose of determining the extent of the injuries received.[1] On the other hand, Mississippi concurs with a number of tribunals which have adopted the rule that the inviolability of the person is a sacred right under the common law, and that the trial court, in the absence of a statute to that effect, has no power to have such an examination without plaintiff's consent.[2] It should be noted that Mr. Wigmore has demonstrated that this doctrine is unsound and erroneous both historically and logically.[3] However, since it has been accepted in Mississippi for several decades, the instant case presented to the court this problem.

Did the plaintiff, by the voluntary exhibition of a portion of her body to the jury, waive her privilege to object to a physical examination by physicians of the defendant's selection? Although the question has not been decided

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[1]Scullin v. Vining, 127 Ark. 124, 191 S. W. 924 (1917); Schroeder v. Chicago, R. I. & P. R. R., 47 Iowa 375 (1877); Cincinnati, N. O. & T. R. R. v. Perkins, 295 Ky. 798, 26 S. W. 652 (1924); Hoyt v. Brewster, Gordon & Co., 191 N. Y. S. 176, 199 App. Div. 68, *rev'g*, 189 N. Y. S. 907 (1921). For complete annotations of the authorities see: Notes (1891) 14 L. R. A. 466; (1908) 23 L. R. A. (N. S.) 463; (1913) 41 L. R. A. (N. S.) 1071; (1926) 51 A. L. R. 183.

[2]Y. & M. V. R. R. v. Robinson, 107 Miss. 192, 65 So. 241 (1914); Gentry v. G. & S. I. R. Co., 109 Miss. 66, 67 So. 849 (1915); Union Pacific R. R. v. Bottsford, 141 U. S. 250, 35 L. ed. 734 (1890); Kennedy v. N. O. R. & Light Co., 142 La. 879, 77 So. 777 (1918). For complete annotations see: Notes (1891) 14 L. R. A. 466; (1908); 23 L. R. A. (N. S.) 463; (1913) 41 L. R. A. (N. S.) 1071; (1926) 51 A. L. R. 183.

[3]4 WIGMORE, EVIDENCE (2d ed. 1923) § 2220 (A) (6).

before in this state, certain basic, well-known principles relating to waiver of a privilege are manifestly apposite.[4] A waiver has been often defined as "the intentional relinquishment of a known right,"[5] but this definition is not adequately inclusive. It is indisputable that a waiver may be implied reasonably from the conduct of a party;[6] hence there are involved two considerations, the interpretation of the actual conduct and the fairness of the situation created by that conduct. A waiver can be predicated "when the conduct (though not evincing that intention) places the claimant in such a position with reference to the evidence that it would be unfair and inconsistent to permit the retention of the privilege."[7] The purpose of the privilege is to permit personal privacy. No further reason for it exists if the injured person has voluntarily thrown secrecy aside. Having exhibited the injured parts of her body to the jury and having introduced controverted X-ray pictures, these parts of plaintiff's body became, in a juristic sense, a part of the evidence in the case, like any other object or thing introduced in evidence, and "the opposite party has the right to make such inspection as will enable him to explain, criticize, or impeach its value as evidence, and to that end have it examined by experts."[8]

In certain states recognizing the privilege, it is held that the party's own voluntary testimony to his physical condition in issue operates as a waiver of the privilege for the testimony of his physician;[9] more exacting, other

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[4]Campbell, *The Doctrine of Waiver* (1904) 3 MICH. L. REV. 9; note (1905) 2 L. R. A. (N. S.) 386 (waiver of right to object to physical examination or exhibition of the person).

[5]United Fireman's Ins. Co. v. Thomas, 82 Fed. 406 (C. C. A. 7th, 1897); Hoxie v. Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240 (1864).

[6]Globe Mutual Ins. Co. v. Wolff, 95 U. S. 326, 24 L. ed. 387 (1877); Atlantic Coast Line R. R. v. Burnette, 239 U. S. 199, 36 S. Ct. 75, 60 L. ed. 226 (1915); Viele v. Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83 (1868).

[7]4 WIGMORE, EVIDENCE (2d ed. 1923) § 2388 (c); see Jones v. State, 65 Miss. 179, 3 So. 379 (1882) (by turning state's evidence criminal waives privileged communication to attorney); Jenkins v. State, 146 Miss. 339, 111 So. 433 (1927). But see Tex. Elec. Ry. v. Powell, 211 S. W. 788 (Tex. Civ. App. 1919) (where plaintiff in testifying to injuries indicated location of pain with his hands, but did not remove any of his clothing, or exhibit any portion of his person, held no waiver of privilege); H. & T. C. R. R. v. Anglin, 86 S. W. 785, (Tex. Civ. App.) *rev'd*, 99 Tex. 349, 89 S. W. 966 (1905) (where plaintiff exhibited to jury a depression of his chest, held no waiver of privilege); United Verde Extension Mining Co. v. Littlejohn, 279 Fed. 223 (C. C. A. 9th, 1922).

[8]Holton v. Janes, 25 N. Mex. 374, 183 Pac. 395, 396 (1919); Chicago & N. W. R. R. Co. v. Kendall, 167 Fed. 62 (C. C. A. 8th, 1909); Johnston v. So. Pac. R. R., 150 Cal. 535, 89 Pac. 348 (1907); Pronskevitch v. C. & A. R. R., 182 Ill. App. 194, aff'd, 267 Ill. 306, 108 N. E. 330 (1915); Svenson v. City of Aurora, 196 Ill. App. 83 (1915); Fleming v. Holleman, 190 N. C. 449, 130 S. E. 131 (1925); Chicago, etc. R. R. v. Langston, 19 Tex. Civ. App. 568, 47 S. W. 1027, 48 S. W. 610 (1899); Galveston, H. & S. A. R. v. Chojenacky, 163 S. W. 1011 (Tex. Civ. App. 1914); Kenney v. Lagrone, 62 S. W. (2d) 600 (Tex. Civ. App. 1933).

[9]Moreno v. New Guadalupe M. Co., 35 Cal. App. 744, 170 Pac. 1088 (1918); Lane v. Boycourt, 128 Ind. 420, 27 N. E. 1111 (1891); Hethier v. Jones, 233 N. Y. 370, 135 N. E. 603 (1922); 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2389 (d) (2), and cases cited; see Jenkins v. State, 146 Miss. 339, 111 So. 433 (1927) (in rape prosecution, consent of grandmother *in loco parentis* of ten year old girl held waiver of physician—patient privilege).

courts say that the privilege may be waived by the plaintiff examining his physician as to his physical condition.[10] Manifestly, either situation should be considered a waiver. Having abandoned his privacy, the plaintiff should not be allowed to stifle further inquiry into the facts. Yet the Mississippi Supreme Court has held that a physician's testimony is not admissible without the consent of the patient, and that the placing of other physicians on the witness stand to testify as to facts learned at the same time because or through the relation does not waive the patient's right to object to the evidence of his physician, even though the examination of the patient was made jointly.[11] Granting the logical absurdity and manifest unfairness of this rule, it is apparent that, as regards Mississippi's attitude to waiver of privileges, it is analogous to the one in the principle case. Traditional juristic logic would probably consider the analogy so apposite as to be binding; however, those physician-patient cases in which the Supreme Court refused to apply the doctrine of waiver by conduct were ignored by the majority opinion. For the sake of consistency in policy and precedent, it is to be regretted that the Court did not indicate its reasons for adopting antithetical policies in analogous situations. Factually, of course, a difference exists, but "it would seem the majority opinion ignores the principle, although not the letter, of the decisions under the privileged communications statute."[12] Although legislative action would probably be necessary to abolish the privilege of plaintiffs to object to physical examinations in personal injury suits, it is hoped that the instant case represents the beginning of a more liberal attitude in Mississippi in construing waivers thereof.

Since plaintiff's waiver gave the defendant a right to a physical examination of plaintiff by a physician of defendant's selection, did the defendant thereby become entitled also to have X-ray pictures made of plaintiff's injuries?[13] There was formerly a sharp division in the authorities on this related question of an additional power to require an X-ray examination. The earlier cases held that, since such photographs often resulted in serious injury to the subject, a use thereof could not be compelled by the court.[14] However, the general rule today is that the trial court has the discretionary power to compel this more accurate examination when it might be reasonably helpful in ascertaining the facts.[15] On the other hand, it has been held that, under

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[10]Wheelock v. Godfrey, 100 Cal. 587, 35 Pac. 317 (1893); Pittsburgh, C. C. & St. L. R. R. v. O'Conner, 171 Ind. 686, 85 N. E. 969 (1908); Chicago, R. I. & P. R. R. v. Hughes, 640 Okla. 74, 16 Pac. 411 (1917).

[11]Davis v. Elzey, 126 Miss. 789, 88 So. 630 (1921); Newton Oil Co. v. Spencer, 116 Miss. 568, 77 So. 605 (1918); Brookhaven Lumber Co. v. Adams, 132 Miss. 689, 97 So. 484 (1923); U. S. F. & G. Co. v. Hood, 124 Miss. 548, 87 So. 115, *sugg. of err. overr.*, 86 So. 814 (1914); *cf.* Hunter v. Hunter, 127 Miss. 683, 90 So. 440 (1922); Dabbs v. Richardson, 137 Miss. 789, 102 So. 769 (1924).

[12]Ethridge, J., dissenting in Dixie Greyhound Lines, Inc. v. Matthews, ... Miss. . . . , 170 So. 686, 692 (1936).

[13]Dixie Greyhound Lines, Inc. v. Matthews, ... Miss. . . . , 170 So. 686, 690, Mr. Chief Justice Smith concurring in part: Plaintiff's waiver entitled defendant to a physical examination, "but I seriously doubt whether it also became entitled to have an X-ray photograph of appellee's body made."

[14]Carter v. Call, 34 Fla. 144, 59 So. 789 (1912); Dean v. Wabash Ry., 229 Mo. 425, 129 S. W. 153 (1910).

[15]Louisiana & A. R. R. v. Woodson, 127 Ark. 323, 192 S. W. 174 (1917); S. L. & S. F. R. R. v. Murphy, 168 Ark. 330, 270 S. W. 956 (1925); Lawrence

a statute giving the court discretionary power to require a physical examination of plaintiff, the physician appointed is not authorized to make X-ray photographs of the person of the plaintiff without his consent.[16] Today, wherever the right to a physical examination of a plaintiff exists, the great majority of courts hold that there likewise exists the correlative right to an X-ray examination, if it may be of any probable value. The modern court's attitude was stated by the New York Appellate Division in 1924: "There has been such a perfection of the science of taking X-ray pictures that their use . . . has become a matter of universal and accepted method in the best medical practice."[17]

Since the plaintiff had introduced X-ray pictures in the instant case, since their accuracy had been disputed by defendant, and since some of the alleged injuries were internal, the court was eminently correct in permitting the defendant to secure an X-ray examination. This issue was clear; the waiver of the privilege having been made, any reasonable method of giving both parties equal opportunities to disclose the facts should be permitted.[18]

William N. Ethridge, Jr.

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v. Pickwick Stages, 68 Cal. App. 494, 229 Pac. 885 (1924) (plaintiff required of defendant an indemnity bond against injuries from X-ray); Cincinnati, N. O. & T. R. R. v. Perkins, 205 Ky. 798, 266 S. W. 652 (1924); Wittengard v. Onsgard, 78 Minn. 342, 81 N. W. 14 (1899); Van House v. Canadian Nor. R. R., 155 Minn. 57, 192 N. W. 493 (1923); Andrus v. Fomfara, 97 N. J. Eq. 546, 127 Atl. 788 (1925); Hollister v. Robertson, 23 N. Y. S. 514, 208 App. Div. 449 (1924); Geminez v. G. A. & P. T. Co., 259 N. Y. S. 579, 236 App. Div. 804; Quinn v. Flesher, 85 W. Va. 451, 102 S. E. 300 (1920); Boelter v. Koss L. Co., 103 Wis. 324, 79 N. W. 243 (1899); see, also, note (1926) 24 MICH. L. REV. 418 (medical examination of plaintiff—X-ray photographs); note (1912) 41 L. R. A. (N. S.) 1071.

[16]Carter v. Call, 64 Fla. 144, 59 So. 789 (1912); Dean v. Wabash R. Co., 229 Mo. 425, 129 S. W. 953 (1910); International etc. Ry. v. Bartck, 177 S. W. 137 (Tex. Civ. App. 1915); note (1912) 41 L. R. A. (N. S.) 1071.

[17]Hollister v. Robertson, 23 N. Y. S. 514, 208 App. Div. 449 (1924); Geminez v. G. A. & P. T. Co., 259 N. Y. S. 597, 236 App. Div. 804.

[18]See Hoyt v. Brewster Gordon & Co., 191 N. Y. S. 176, 199 App. Div. 68, *rev'g* 181 N. Y. S. 907 (1921), where, under a provision of a New York statute authorizing physical examinations, it was held that the court had the power to require a sample of the plaintiff's blood to be taken by a physician selected by the plaintiff. In the principle case, the court stated, on page 690, that the plaintiff became subject to an examination "by experts of the defendant's selection." Would not it be a more practical aid in getting all the facts if the experts were selected by the court itself? For a case where it was held that the experts must be argeed on by the parties or appointed by the court, see Stuart v. Haven, 17 Neb. 211, 22 N. W. 419 (1885), following Sioux City & P. Ry. v. Finlayson, 16 Neb. 578, 20 N. W. 860 (1884). *Contra*: White v. Milwaukee City Ry., 61 Wis. 536, 21 N. W. 524 (1884).

EVIDENCE—ADMISSIBILITY OF EXPERIMENTS.

In an action for murder, the defendant admitted that he shot and killed the deceased with a shot gun, and defended on the ground that the deceased was advancing upon him with a knife, threatening to kill the defendant. An eye witness introduced on behalf of the state testified that at the instant of the firing of the fatal shot, the deceased was approximately 20 feet away from the defendant. The question of the distance of the defendant from the deceased at the time of the firing of the shot was therefore a material issue in the case. The sheriff subsequently to the homicide made tests with the defendant's gun, and with shells of the same kind as found in the gun, upon patterns, these tests being made at distances of 15 feet, 20 feet and 25 feet from the gun. These patterns were introduced into evidence and the sheriff testified that the pattern which was made at 20 feet corresponded with the pattern upon the body of the deceased of which an examination was made about an hour after the homicide. In this the sheriff was corroborated by the physician who examined the dead body and who was shown the patterns at the trial. The defendant argued that these tests were improperly admitted, because it was not shown with sufficient certainty that the tests were made with shells loaded with the same kind of powder which was in the particular shell with which the deceased was shot, it being admitted in evidence that different sized loads of powder will make a different pattern in scattering of small shot, such as were the shot which killed the deceased. HELD: Experimental evidence is admissible in a homicide prosecution where comparative conditions are such as to be substantially the same in regard to the particular issue involved, affording a fair comparison. Whether circumstances of experiments are identical to such extent as to render them admissible is within the sound discretion of the trial judge. *Brown v. State*, ... Miss. . . . , 169 So. 837 (1936).

It is authoritatively settled "that the conditions of a relevant occurrence may be artificially created in an experiment, and, where the material facts bearing on a particular issue are precisely duplicated in the experiment, the result may be received in evidence."[1] The courts of this country are in accord on the general principle of admissibility of experiments into evidence. Experiments frequently are resorted to and are often the very best evidence that can be offered.[2] The criterion for admissibility of experimental evidence seems to be whether such evidence tends to enlighten the jury and enable them more intelligently to consider the issues presented.[3] However, some courts have held that evidence of an experiment should be received by the court with caution, and then only when it is clear that the jury will be enlightened thereby.[4] Evidence of an experiment that is performed to test the truth of testimony that a certain thing has occurred is not admissible into evidence where conditions attendant upon the experiment and the alleged occurrence are not shown to be similar.[5] For experimental evidence to be of any value, the con-

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[1]22 C. J. 755; Harrison v. Southern R. R., 93 Miss. 40, 46 So. 408 (1907).

[2]5 ENCYCLOPEDIA OF EVIDENCE 473.

[3]State v. Newman, 101 W. Va. 356, 132 S. E. 728 (1926); see Burg v. Chicago Ry., 90 Iowa 106, 119, 57 N. W. 680, 683 (1894).

[4]Hisler v. State, 52 Fla. 30, 42 So. 692 (1906); Martin v. State, 68 Fla. 18, 66 So. 139 (1914).

[5]Spires v. State, 50 Fla. 121, 39 So. 181 (1905).

ditions affecting the results thereof must be substantially identical with those existing at the time of and operating to produce the original occurrence in question.[6] It would seem, in view of the holdings here cited, that a substantial similarity to the particular facts involved is another criterion for the admissibility of experiments into evidence. The courts of Florida have held that targets into which shots have been fired from a gun as an experiment should not be allowed in evidence over objection, where it does not appear that the same or similar gun was used, or that the shot, powder and loading were similar, or that the target was so placed as to be similar in position to the object in controversy.[7] Results of experiments with firearms are not conclusive, but are competent on issue of guilt in homicide cases, their weight being for the jury.[8]

It is conceded that the admission of evidence of an experimental nature is largely with the discretion of the trial court.[9] Whether such evidence, resulting from experiments is admissible or not depends upon the circumstances of each case, and is a preliminary question for the determination of the court in the exercise of its discretion.[10] Such discretion on the part of the trial court will not be interfered with by an appellate tribunal unless an abuse of discretion is evident and made clearly to appear.[11]

The question has been presented in a large number of cases as to the admissibility of evidence of the performance of an experiment that has taken place outside the court. The courts have uniformly stated that the experiments which have been performed without the presence of the party affected thereby does not render evidence of such experiments inadmissible.[12] It would appear under the force of this holding that the only requirement of experiments made out of court affecting their admissibility is that they be made under similar conditions and directly illustrate a material issue.[13] In

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[6]People v. Halbert, 78 Cal. App. 598, 248 Pac. 969 (1926); State v. Newman, 101 W. Va. 356, 132 S. E. 728 (1926). An interesting point is presented in Simpson v. State, 111 Ala. 6, 20 So. 572 (1896), wherein the defendant offered to show that two bloodhounds, of the same breed as those employed to track the supposed criminal and trained by the same men, when put on the trail of a human being had left it to follow the trail of a sheep. This comparative test was held not sufficiently certain to determine the reliability of the dogs used to track the defendant. Under holding of the Alabama court a substantial similarity with the act under observation is sufficient to admit evidence of experimental observations. Spelce v. State, 20 Ala. App. 412, 103 So. 694 (1924). "The conditions in the experiment must be substantially the same as those under which the occurrence in question took place." People v. Ely, 84 Cal. App. 325, 258 Pac. 146 (1927); Roberts v. State, 117 Tex. Crim. Rep. 118, 35 S. W. (2d) 175 (1931); Shephard v. State, 51 Okla. Crim. 209, 300 Pac. 421 (1931); People v. Parker, 4 Cal. App. (2d) 308, 40 P. (2d) 836 (1935).

[7]Hisler v. State, 52 Fla. 30, 42 So. 692 (1906).

[8]People v. Willis, 70 Cal. App. 465, 233 Pac. 812 (1924).

[9]People v. Wagner, 29 Cal. App. 263, 155 Pac. 649 (1916); People v. Parker, 4 Cal. App. (2d) 308, 40 P. (2d) 836 (1935); State v. Harris, 100 N. J. L. 184, 124 Atl. 602 (1924).

[10]Spires v. State, 50 Fla. 121, 39 So. 181 (1905); Lille v. State, 72 Neb. 228, 100 N. W. 316 (1904); Bell v. State, 35 Ga. App. 89, 132 S. E. 238 (1927).

[11]U. S. v. Ball, 163 U. S. 662, 16 S. Ct 1192 (1896); U. S. v. Reid, 42 Fed. 134 (W. D. Mich. 1890).

[12]People v. Fisher, 340 Ill. 216, 172 N. E. 743 (1930).

[13]Hicks v. State, 146 Ga. 221, 91 S. E. 57 (1916).

other words, it is entirely immaterial that the accused is not present at the time that such experiments are made which are later to be presented in evidence. Likewise it may be said that notice to the adverse party of the performance of experiments is not necessary and does not render such evidence incompetent.[14]

One Mississippi case holds that evidence showing the comparison of foot prints as a means of identifying a guilty party is admissible.[15] This same case holds that it is competent for a witness to testify that he fitted shoes, found on the accused, in tracks found near the scene of the crime. At such a point as this, it seems that the trial court should be extremely cautious in the admission of all such evidence, particularly where a man is on trial for his life. It would appear that the admissibility thereof should at least be contingent upon the presence at the performance of the experiment of one or more reliable witnesses who could corroborate the testimony of the witness performing the experiment, such corroboration being as to the circumstances of the experiment and the material facts thereof. Then the trial court would not assume so much responsibility in the admission of experimental evidence. A man on trial for his life is placed at a decided peril in having evidence of an experimental nature admitted against him when it is not clearly shown that such experiment was in fact performed under similar circumstances to the particular issue involved. While it is true that notice to an adverse party is not necessary and that the presence of the accused is immaterial to the admissibility of such evidence, in order that every person on trial may be assured of justice, the courts should nevertheless require corroborative testimony to sustain the testimony of the witness who performed the experiment.

Norman C. Brewer, Jr.

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[14]Burg v. Chicago Ry., 90 Iowa 106, 57 N. W. 680 (1894).
[15]Underwood v. State, 93 Miss. 24, 66 So. 285 (1914).

NEGLIGENCE—SCINTILLA OF EVIDENCE—CUSTOM.

The plaintiff, an invitee of the defendant, fell and broke her arm while going from her room on the third floor to the second floor of the hospital. The injury was caused by the highly polished and slippery condition of the linoleum covering the hallway. It was shown that the linoleum covering was commonly used by other hospitals, stores, and other public buildings. The waxing was done as directed by the makers of the wax used. The hospital had carried on this waxing process for eight years preceding the plaintiff's accident and no accidents of this type had previously occurred. HELD: Directed verdict of the lower court for the defendant affirmed. *Daniel v. Jackson Infirmary*, 173 Miss. 832, 163 So. 447 (1935).

The plaintiff, being an invitee of the defendant, is owed a duty to see that no injuries occur to her. In cases of this character as in others involving like duties, "the test is not danger, but negligence; and negligence is the failure to take such reasonable care as is taken by reasonable prudent men."[1] The defendant, being a person who maintained a public place of business is bound to keep it, and the passageways to and from it, in a reasonably safe condition and to use ordinary care to avoid accidents or injury to those properly entering upon the premises on business.[2] This includes a duty to see that the floors and passageways of the buildings are installed properly and maintained in a reasonably safe condition.[3]

However, it is incumbent on the plaintiff to establish the defendant's breach of duty.[4] He may prove this by affirmative acts of negligence, but often he is forced to introduce the occurrence of the injury and attendant circumstances without being able to establish the particular default giving rise to the injury.[5] If such is the case the doctrine of *res ipsa loquitur* applies.[6] If the circumstances attendant on the injury are of such a character as call for explanation by the defendant the court may refuse to direct a verdict in favor of the defendant until the defendant has explained away the suspicious circumstances. Thus, in the instant case, the principal question was whether

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[1]Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580 (1889); Davis v. Central Cong. Soc., 129 Mass. 367, 37 Am. Rep. 368 (1880); Shelby Iron Co. v. Cole, 208 Ala. 657, 95 So. 47 (1922); Shields v. Van Kelton Amusement Corp., 228 N. Y. 396, 127 N. E. 261 (1920); Larkin v. O'Neil, 119 N. Y. 221, 23 N. E. 563 (1890); Plummer v. Vill, 156 Mass. 406, 31 N. E. 128 (1892).

[2]Kapperty v. The Jerseyman, 98 N. J. L. 836, 121 Atl. 718 (1923); Callan v. Pugh, 54 App. Div. 548, 66 N. Y. S. 118 (1900); Schantter v. Bamberger, 81 N. J. L. 558, 79 Atl. 324 (1911); Bloomer v. Snellburg, 221 Pa. St. 25, 69 Atl. 1124 (1908); Spichernagle v. Woolworth, 236 Pa. St. 496, 84 Atl. 909, Ann. Cas. 1914A 132 (1912).

[3]Kapperty v. The Jerseyman, 98 N. J. L. 836, 121 Atl. 718 (1923); Callan v. Pugh, 54 App. Div. 548, 66 N. Y. S. 118 (1900); Schantter v. Bamberger, 81 N. J. L. 558, 79 Atl. 324 (1911).

[4]Means v. Southern Cal. R. R., 144 Cal. 473, 77 Pac. 1001, 1 Ann. Cas. 206 (1904); Gosney v. Louisville R. R., 169 Ky. 323, 183 S. W. 538, L. R. A. 1916E 458 (1916); Faurot v. Oklahoma Wholesale Grocery, 21 Okla. 104, 95 Pac. 463, 17 L. R. A. (N. S.) (1908); Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261 (1893).

[5]City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817, Ann. Cas. 1912A 108, 32 L. R. A. (N. S.) 59 (1910); Doughtery v. Milliken, 163 N. Y. 527, 57 N. E. 757, 79 Am. St. Rep. 608 (1900); Dail v. Taylor, 151 N. C. 284, 66 S. E. 135, 28 L. R. A. (N. S.) 949 (1909).

[6]Pittsburg R. R. v. Boughton, 81 Ind. App. 129, 142 N. E. 869 (1924); Waller v. Ross, 100 Minn. 7, 110 N. W. 252, 117 Am. St. Rep. 661, 10 Ann. Cas. 715 (1907); Beeler v. Ponting, 116 Ohio St. 432, 156 N. E. 599 (1927); Coblentz v. Jaloff, 115 Ore. 656, 239 Pac. 825 (1925).

the introduction of evidence showing that the defendant conformed to the customary manner of maintaining his floor was sufficient to rebut the inference of negligence which arose from the mere occurrence of the misfortune. One rule holds custom to be a standard for reasonable prudence; the other allows the custom to be submitted to the jury as a factor along with the other circumstances.

The first rule holds that the custom itself is a standard for reasonable prudence. Where the common usage of business or occupation is frequently stated to be a test of reasonable care,[7] the courts have said an actor uses due and reasonable care when such conduct on his part is customarily used in a similar undertaking or business.[8] In the case of *Louisville & Nashville Railroad Co. v. Bates*,[9] the court ruled that if the company inspected the cars as was customarily done by other railroads, the inspection was done with care and a jury cannot be permitted to say that the company was negligent. "The jury cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of a community."[10] It should be noted at this point that in cases which fall under this rule, the custom on its surface shows itself to be equal to a standard which an ordinary prudent man would have observed under the same circumstances. They are not cases that shock the minds of the court.

The second and most generally accepted rule is that the doctrine of customary usage does not apply to the question of legal duty under the law of negligence. Under this rule the custom that is beseeched does not on its surface seem to be of reasonable prudence. The customary methods or conduct do not furnish a test which is conclusive or fix a standard by which negligence is to be appraised. The care a person owes another is that which a reasonable prudent man would have exercised under like circumstances.[11] All the customary standard amounts to is a condition to be submitted to the jury, along with other facts and circumstances, to determine whether due and reasonable care has been exercised by the actor. Negligence may exist although the actor did conform to the custom usually followed in that trade or business.[12] As to the maintenance of buildings the customary doctrine was applied in the case of *Gardner v. Friedrich*,[13] the court holding that although the operator did conform to the commonly expected custom of the business, neverthe-

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[7]McCrea v. Beverly Gas Co., 216 Mass. 495, 104 N. E. 365 (1914); Shannahan v. Empire Engineering Co., 204 N. Y. 543, 98 N. E. 9 (1912); Hoffman v. Am. Fidelity Co., 18 Wash. 287, 51 Pac. 385 (1897).

[8]Ketteree v. Armour, 247 Fed. 921, 161 C. C. A. 111, L. R. A. 1918D 49 (1917); William Laurie Co. v. McCullough, 174 Ind. 477, 90 N. E. 1014, Ann. Cas. 1913A 49 (1910); Titus v. Bradford R. R., 136 Pa. 618, 20 Atl. 517, 20 Am. St. Rep. 944 (1890).

[9]L. & N. R. R. v. Bates, 146 Ind. 564, 45 N. E. 108 (1896).

[10]*Id.* at 111.

[11]Northam *et al.* v. Boston & Montana Con. Copper & Silver Mining Co., 190 Fed. 722, 111 C. C. A. 450 (1911); Sawyer v. J. M. Arnold Show Co., 90 Me. 369, 38 Atl. 333 (1897); Texas & Pac. R. R. v. Behymer, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. ed. 905 (1903).

[12]U. S. Chicago R. R. v. Nelson, 226 Fed. 708, 141 C. C. A. 464 (1915); Hansel Elcock Fidelity Co. v. Clark, 214 Ill. 399, 73 N. E. 787 (1905); Gardner v. Friederich, 25 App. Div. 521, 49 N. Y. S. 1077 (1898); Grant v. Graham Chero-Cola Bottling Co., 176 N. C. 256, 97 S. E. 277, 4 A. L. R. 1090 (1918); O'Connor v. Andrews, 81 Tex. 28, 16 S. W. 628 (1821); Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 Pac. 829 (1896); Hill Gro. Co. v. Hameker, 18 Ala. App. 84, 89 So. 850 (1921).

[13]25 App. Div. 521, 49 N. Y. S. 1077 (1898).

less the owner was negligent. In the case of *Reed v. Hammel Dry Goods Co.*,[14] the plaintiff fell over some scales in the hallway of a store in which he was an invitee. The court held that the placing of the scales in the hallway was a direct breach of duty the owner owed to invitees. The fact that stores of similar character place scales in this manner, and the fact that the owner lived up to this custom did not prove reasonableness. It appears to the author that the custom under this second rule does not on its surface show itself to be equal to a standard which an ordinary prudent man would have observed under like circumstances. Thus the courts when dealing with this type of custom merely submit it to the jury as evidence; but in some cases when the custom is obviously not reasonable, the courts will not let it be submitted at all to the jury.

Since there were no Mississippi cases directly in point, the court laid great emphasis on the case of *Bonawitt v. Sisters of Charity of St. Vincent's Hospital.*[15] In that case the plaintiff had a daughter in the hospital. While visiting her, plaintiff fell on the slick hallway and received injuries. The court ruled that, since this type of hallway was customarily used by hospitals, the defendant was not liable for the injuries received by the plaintiff.

The plaintiff in the instant case has not made out a true *res ipsa loquitur* case, and in most states the defendant would not have been called on to explain the occurrence of the injury. But since Mississippi adheres to the scintilla of evidence rule,[16] the court thought the plaintiff had introduced enough evidence by the mere happening of the accident to call for an explanation on the part of the defendant. The defendant rebutted this easily by showing that the circumstances were in no sense unusual. This was done by evidence of conformity to general time honored custom. The plaintiff did not introduce a case here in which the circumstances were shocking to the mind of the court; therefore, the living up to a custom followed by careful prudent men was considered by the court to be a test of negligence.

Robert S. Newton

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[14]Reed v. Hammel Dry Goods Co., 215 Ala. 494, 111 So. 237 (1927).

[15] . . . . Ohio . . . . , 182 N. E. 661 (1932).

[16]State v. Spengler, 74 Miss. 129, 21 So. 4 (1896); Strauss v. Nat. Parlor Furniture Co., 76 Miss. 343, 24 So. 703 (1899); Alabama Great So. R. R. v. Daniel, 108 Miss. 358, 66 So. 730 (1914); Seutter v. Bank of Commerce of Gulfport, 107 Miss. 342, 65 So. 458 (1914).

BOOK REVIEWS

JUDGES AND LAW REFORM. By Sam Bass Warner and Henry B. Cabot. Cambridge: Harvard University Press. 1936. Pp. viii, 246. $3.00.

"Real administration of justice is a positive thing. It consists of positive powers, positively exercised. It is not the passive thing the public is now receiving. The function of the Judiciary, one of the three greatest departments of our Government, is to administer justice with all that the word administer implies. That function is not adequately exercised by sitting on a bench and watching justice float by." These words, quoted by the authors from a Chamber of Commerce committee report,[1] give the theme-song of the book. The greater part of the volume is devoted to a concrete description of the working of the courts of Boston in criminal cases, with special attention to those features of the administration of criminal justice which need improvement. The weak spots are diagnosed and the remedies are indicated with the practicality which comes from extended observation and careful analysis.

Among the weaknesses which are considered are: The difficulties of District Court judges who have the task of being and appearing impartial as judges while they must likewise practice actively as lawyers in other District Courts in order to make a living; the pernicious system of trial *de novo* of minor cases on appeal; the overloading of the District Attorney's staff, preventing adequate preparation for trial, and the consequent low ratio of convictions in the Superior Court; the poor personnel of juries, the undue expense of jury trial, and the shabby treatment of the triers; the multiplication of unnecessary hearings which, coupled with delays and continuances, impose such hardship on parties and witnesses as to discourage citizens from cooperating in law enforcement; and the need for a disposition tribunal, separate from the court which tries the criminal, which would determine the sentence, and could develop standards which would lead to a nearer approach to uniformity. In the discussion of all of these and numerous other specific problems which face the Boston judges, the authors consider realistically how far the remedies require constitutional changes or legislative action, and how far the judges could by resolute self-help, solve the difficulty.

Those of us who live in states where judges are chosen by the people's suffrage, find especially interesting the chapter on Personnel and Organization. The authors do not suggest that the prevailing impression that Massachusetts judges, appointed for life, are of superior caliber, is ill-grounded but they do point out dangers of collapse of the tradition. Thus, when a Bar Association committee protested the nomination by Governor Curley of a member of his Council for justice of the Superior Court, on the ground that it would be interpreted by the public as a reward for a complaisant failure to vote in the Council against a certain other appointment, the Governor called their action "an unwarranted and gratuitous impertinence."

Of widest interest is the final chapter on Continuous Reform of the Law. It has lessons for every state in its thoughtful consideration of the various groups which can be expected to initiate reforms in the administration of law. Particularly is it significant in the light it sheds upon the effectiveness of a judicial council in mobilizing the forces of change. Massachusetts has one of the few councils which is more than a gesture. As the authors show, it has struck many of those small blows which, like a sculptor's, will in time reshape the practice.

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[1] P. 220.

The curious thing is that, though the statute creating the Council empowers it to make recommendations to the courts for changes in the rules, nevertheless the courts have largely ignored such recommendations, and its accomplishments, in the main, have been due to the legislature's willingness to heed its suggestions. So ingrained is the "What is that to me?" attitude of the judges in respect to improvements in administration, that the Council, when it proposes that chairs be provided for witnesses, or that the opinion written in a case by the trial judge be included in the record on appeal, has been led by experience to make such recommendation, not to the courts but to the legislature. The authors suggest that the courts' future role in law reform will depend very largely on whether they secure adequate power,[2] and recommend that their present rule-making power be expanded, presumably to the extent of superseding existing statutory regulations. Doubtless they would acknowledge that the willingness of the judges to assume procedural responsibility is still more vital, and without it a mere enabling act will be empty of results. They point out that the emphasis in appellate work is shifting from the job of making substantive law in opinions to the task of dispensing individual justice speedily at the least cost.[3] If so, it may be presumed that the attention of supreme courts will more and more be turned to the improvement of methods of administration.

The volume's portrayal of the successes and failures of the Massachusetts Judicial Council merits careful study in a state like Mississippi where the organized bar is still to face the task of creating some such agency. One infers that in Massachusetts the successes are due largely to the wise step of providing the Council with an able permanent salaried secretary.[4] One reason for its failures, as the authors point out, is the fact that no sitting judges (but only ex-judges) are among its members. Since the interests and demands of the bench, bar and public must be reconciled in the process of changing and improving judicial administration, and the legislature's cooperation must be won, it would seem expedient that the Council, though it must needs be small, should contain not only judges and lawyers, but key-legislators and laymen besides.[5] The statesmanlike address[6] of President Venable of the Mississippi State Bar Association in 1932, presents a wise and liberal program for such a group. If such a council should ever come into being, may they be aided by constructive criticism of the sort which the present work affords.

*Charles T. McCormick**

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[2]P. 221.

[3]P. 210.

[4]"Not only has the council been fortunate in having some very able and energetic members, but in securing as its secretary Mr. Frank W. Grinnell, an unusually public-spirited lawyer who combines knowledge of needed judicial reforms with a remarkable aptitude for bringing them about." Another device is to commandeer the services of professors of procedure in the law schools. Thus Prof. E. R. Sunderland in Michigan and Prof. R. W. Stayton in Texas have been drafted by the local judicial councils with notable results.

[5]Compare the make-up of the Commission for the Improvement of The Law in North Carolina, consisting of the Attorney-General, the Chairmen of the Judiciary Committees in the General Assembly, two judges of the courts, two attorneys in active practice, a member of each of the law school faculties, and two laymen. Pub. L. 1931, ch. 98; 9 N. C. L. Rev. 382 (1931).

[6]Proc. 1st Ann. Meeting, Miss. St. Bar (1932) 5 MISS. L. J. 17 *et seq.*

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THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW. By R. M. Jackson. Cambridge: At the University Press. New York: The Macmillan Company. 1936. Pp. xxxi, 134. $3.75.

This book should arouse interest in the United States because of the forthcoming *Restatement on Restitution and Unjust Enrichment.* In that work, of course, quasi-contracts constitutes the major part. A well-sketched history of the development of the field should therefore be of real value.

We are told by Dr. Hazletine, the editor of the series of studies of which this book is the tenth, that the book "is in fact the first detailed account of an important historical development, continuous from the time of Bracton to our own day, to make its appearance in the literature of English law."[1] This satement is slightly inaccurate because the book makes no effort to trace the history any further than through the first decade or two of the last century—through the period of "the establishment of the main principles only."[2] Mr. Jackson proposes "to write before long a book on the modern law of quasi-contract,"[3] and he probably intends the material of the present volume to serve as a background for the forthcoming treatise.

The book is divided into two parts: (1) before the development of indebitatus assumpsit, and (2) after the rise of that action. Mr. Jackson has bestowed considerable research upon the first part and has made a detailed examination of the primary authorities. His arrangement of the results of his search has made much clearer to us the part played by the action of account in the development of quasi-contracts.[4] He even devotes some space to a general discussion of the nature of account and indicates his complete disagreement with the views of Langdell—his conclusion being that there is no logical theory capable of explaining the action, which he considers to include a number of "well-known categories," whose selection was "made by pure empiricism."[5]

Part Two of the book begins with a short discussion of the development of the quasi-contractual aspect of indebitatus assumpsit. But most of the space in this second part is taken up with a consideration of various types of situations in which Mr. Jackson deems the relief to be quasi-contractual in nature. In selecting and arranging these topics he does not appear to have any particular scheme in mind,[6] and he must have adopted them merely for their convenience in presenting the cases decided during the period covered. In general, they include most of the situations which we on this side of the Atlantic would expect. Certain familiar topics are missing, but there would appear to be reasons for most of the omissions.

The treatment of these subjects is competent. There is nothing startling or completely new in it. Mr. Jackson is treating the matter from a historical

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[1] P. ix.

[2] P. xxiii. The title of the second part of the book is "From the rise of indebitatus assumpsit to the settlement of the main principles."

[3] P. xxiii.

[4] Of particular interest are his consideration of "whether medieval law knew any process akin to waiver of tort" (§ 4), and of recovery of money paid for a consideration which failed (§ 6). The explanation of the development of the requirement of privity in such actions (pp. 15-17) is also helpful.

[5] § 15.

[6] Thus, some of them are procedural (*e.g.*, § 20, claims for money paid; § 24, quantum meruit; § 28, claims on an account stated), while others are factual (*e.g.*, § 21, recovery of money paid by mistake; § 25, recovery of money paid on an illegal consideration; § 29, the duties of an agent).

standpoint and is not attempting to present the law of today or to indicate what it should be. In collecting the authorities over the period covered, he is very thorough and painstaking, but apparently does not make an effort to be exhaustive.[7]

I confess to a mild sort of wonder that nowhere in the book is any reference made to William David Evans' *Essay on the Action for Money Had and Received.* Published about 1802, at a time when Mr. Jackson's "main principles" were being established, this study was the first independent treatment of the subject and remained the only one until the appearance of Keener's treatise almost a century later. It was infrequently cited and little-known, but must nevertheless be considered a work of real value not only from a historical standpoint but also because of its own intrinsic worth.[8]

In his interpretation of the authorities which he collects Mr. Jackson is usually accurate. but there are a few instances where his interpretation is subject to doubt. A particular example is his discussion of "The Scope of Waiver of Tort."[9] In this discussion, he asserts: "It is probable that the line was drawn by the application of the principle that an action for money had and received would not lie unless a specific sum of money had been received, or could be deemed to have been received. . . . The basic rule was that indebitatus assumpsit would not lie if the defendant had received no money."[10] Here, the clear implication (and it is made even clearer by the rest of the section) is that the action of money had and received was the only form available if the plaintiff wished to waive the tort and that he must therefore prove the specific sum of *money* which was received.[11] Is the statement true? The only authority cited by Mr. Jackson for the second sentence quoted above is *Nightingal v. Devisme,*[12] which held that an action for money had and received would not lie where the defendant had received stock in a joint-stock company. But does that mean that no form of indebitatus assumpsit would lie? Lord Mansfield expressly limited the holding of the court to the statement that the particular action would not lie and added that "We do not say that an action cannot be framed so as to come at justice in this case."

According to the principle which Mr. Jackson lays down, *Lightly v. Clouston*[13] and *Foster v. Stewart*[14]—cases holding that where one entices away an-

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[7]Section 25, dealing with "recovery of money paid on an illegal consideration," may be taken as an example. Practically every one of the cases is cited, but attention may be called to the failure to mention Webb v. Russell (1731) BULLER, NISI PRIUS *132, one of the few cases before the time of Lord Mansfield, and Oom v. Bruce, 12 East 225, 104 Eng. Rep. 87 (K. B. 1810) and Hentig v. Staniforth, 5 M. & S. 122, 105 Eng. Rep. 996 (K. B. 1816). These last two omissions are particularly telling, because the writer cites Drummond v. Deey, 1 Esp. 152, 170 Eng. Rep. 310 (1794), a Nisi Prius case, as authority for the statement that "a person who has ignorantly engaged in an illegal contract through the fraud of another can recover what he has paid," whereas the two omitted cases were decided by the King's Bench and hold that even in the absence of fraud the plaintiff may recover if he was ignorant of the *facts* making the contract illegal.

[8]Also of importance are some of the same writer's extensive notes in the second volume of his translation in 1806 of POTHIER ON OBLIGATIONS.

[9]§ 22(4).

[10]Pp. 76, 77.

[11]On p. 80 Mr. Jackson says, "my contention [is] that the limit of waiver of tort has been the conception of 'money received.'"

[12]5 Burr. 2589, 98 Eng. Rep. 361 (K. B. 1770).

[13]1 Taunt. 112, 127 Eng. Rep. 774 (C. P. 1808).

[14]3 M. & S. 191, 105 Eng. Rep. 582 (K. B. 1814).

other's apprentice, the master may waive the tort and sue for the value of the apprentice's labor—either are wrong on principle[15] or must be explained on the ground that services are money received, "because the labour of apprentices can be specified and valued by current wage rates."[16] To many of us, this latter course would not be disturbing, because there were enough fictions present anyhow and an additional one as to the nature of "money" would be innocuous. But if the explanation is adopted here, it is very difficult to see why it would not always apply and allow the action of money had and received to become in reality an action for *benefit* had and received. Is the explanation necessary at all? I think not. In both *Lightly v. Clouston* and *Foster v. Stewart*, the action was one of "indebitatus assumpsit for work and labour." Where is the need to bother with money? True, these two decisions were not rendered until 1808 and 1814. But even if they are considered as creating a new principle, they are still early enough to come within Mr. Jackson's period of "the settlement of the main principles." And it is difficult to decide that the principle is new in the light of Lord Mansfield's dictum in 1776: "So if a man take a horse from another, and bring him back again; an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor."[17] Lord Mansfield certainly meant that the same action would have lain against the trespasser himself, and his words and the circumstances make it clear that the form of assumpsit to bring was not money had and received.

The explanation here offered is not inconsistent with others of the early cases on waiver of tort cited in the book, except the dictum of Lord Alvanley in *Bennett v. Francis*,[18] to the effect that though an action for money had and received might be brought when the goods had been sold by the converter, an action for goods sold and delivered could not be brought when he still had them in his possession. The assigned reason, repeated and apparently approved by Mr. Jackson, is that in trover the defendant might hand over the goods and be liable only for nominal damages, whereas to give the plaintiff the option of waiving the tort would deprive the defendant of this privilege. Assuming that if this is true the plaintiff should not be given the option, we must still be convinced that it is true. If the court would give the defendant the privilege of returning the chattel in an action of trover, why should it not do so in an action for goods sold and delivered? That would probably have ended the plaintiff's chances of recovering in the particular action brought and would have required him to bring an action such as that suggested by Lord Mansfield, for the "use and hire" of the chattel.

If Mr. Jackson wishes to cite in answer the case of *Phillips v. Homfray*[19] (and I feel that he has looked at the earlier cases in the light of it, just as I have probably looked at them in the light of the more liberal American cases), the reply is two-fold: (1) the case was not decided until 1883, over half a century after the period which Mr. Jackson is discussing;[20] (2) the actual decision of the case is certainly not inconsistent with the argument and the opinion does not necessarily destroy it.

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[15]"It is doubtful whether these two cases can be considered good law today." P. 80. See also, p. 77.

[16]P. 80.

[17]Hambly v. Trott, 1 Cowp. 371, 375, 98 Eng. Rep. 1136, 1138 (K. B. 1776).

[18]2 Bos. & P. 550, 554-55, 126 Eng. Rep. 1433, 1436 (C. P. 1801).

[19]24 Ch. D. 439 (C. A. 1883).

[20]An intermediate case of interest is Russell v. Bell, 10 M. & W. 340, 152 Eng. Rep. 500 (Ex. 1842). Lord Abinger's remarks in that case appear to lend substance to my argument.

The limits of space for a book review have prevented a detailed consideration of the numerous cases which may have some bearing on the question, and I have dealt with the matter at such length only because of the respectable number of jurisdictions in this country which, following *Jones v. Hoar*,[21] have held on supposed historical grounds that the converter must have sold the goods and received the money before the plaintiff can waive the tort and maintain assumpsit.

Following the general historical survey, Mr. Jackson gives us several pages on "the basis of claims for money had and received and money paid."[22] His views on this problem do not correspond with previous English writers on the subject, being at once more strict and more liberal. He disagrees with Professor Winfield[23] and Dr. Hanbury[24] as to the effect of Lord Mansfield's decisions in *Moses v. Macferlan*[25] and the other cases in which he announced the principle underlying the action of money had and received. Unlike them, he feels that Lord Mansfield did not introduce a new theory or disregard the fiction of an implied contract. True, he spoke of recovery whenever the defendant had money which *ex aequo et bono* he ought to refund and insisted upon the similarity between this action and a bill in equity. But "The *aequum et bonum* theory was not the basis of the action but the basis for deciding when the law will imply a contract."[26] The contract implied in law has therefore never been discarded; and the decision of the House of Lords in *Sinclair v. Brougham*,[27] to the effect that a person incapable of contracting in fact can never be liable in quasi-contract, is but "a logical application of principles which have been accepted . . . for over 250 years."[28]

Then, just when we are expecting him to "join the mob who are hurling rocks at Lord Mansfield"[29] he begins to show a restrained approval of Mansfield's doctrine. The doctrine may have been a source of some confusion, and it was "pruned"; but the "process of 'pruning' has also produced some doctrines of doubtful utility." Had Lord Mansfield "spoken of 'public policy' and 'what is reasonable' instead of using the oratorical flourishes of his day," we should describe certain of these "prunings" as "a logical development of his views."[30] And even today, there "can be no simple answer to the question when our courts will imply a contract: they will do so in a type of case when the judges see fit, applying the usual judicial process."[31] No railing here at the law of quasi-contract as being nothing but "well-meaning sloppiness of thought";[32] no feeling that it must be crystalized into definite, detailed rules

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[21] 5 Pick. 285 (Mass. 1827).

[22] § 30.

[23] PROVINCE OF THE LAW OF TORT (1931) ch. 7.

[24] *The Recovery of Money* (1924) 40 L. Q. REV. 31, reprinted in ESSAYS IN EQUITY (1934) No. 1.

[25] 2 Burr. 1005, 97 Eng. Rep. 676 (K. B. 1760).

[26] P. 119.

[27] [1914] A. C. 398.

[28] P. 119. Even if one agrees with Mr. Jackson's views as to the effect of Moses v. Macferlan and the other decisions by Lord Mansfield, he will very probably disagree with this last statement. If the promise is entirely fictitious and never required to be present in fact, there is no reason why the court should require the defendant to be legally capable of making an actual promise. *Cf.* Sceva v. True, 53 N. H. 627 (1873). For an apt ridiculing of Sinclair v. Brougham, see Chafee, Book Review (1935) 48 HARV. L. REV. 523.

[29] Chafee, Book Review (1935) 48 HARV. L. REV. 523, 525.

[30] P. 121.

[31] P. 122.

[32] Scrutton L. J., in Holt v. Markham [1923] 1 K. B. 504, 513 (C. A.).

in order to avoid the "shifting quicksands of natural equity";[33] no condemnation of it as merely "that vague jurisprudence which is sometimes attractively styled 'justice between man and man,'" which, whatever "may have been the case 146 years ago, we are not now free in the twentieth century to administer."[34] But, of course, no indication of a general principle of unjust enrichment, no inclusion of anything more than actions for money had and received and money paid. It would be very interesting to learn how Mr. Jackson, with his moderately-liberal English view, would regard the American *Restatement of Restitution and Unjust Enrichment.*

Mr. Jackson's view that the requirement of the fictitious contract was never eliminated in English law is of course one of interpretation of the cases. It may be pointed out that Lord Mansfield made practically no reference to the implied contract and yet was always careful to indicate the basis for recovery in this type of action. With the reaction after his death and that of Buller, the judges did make reference again to the fictitious contract, but this talk gradually lessened. After such decisions as *Kelly v. Solari*[35] and In re *Rhodes*,[36] it seemed entirely reasonable to believe that the fiction was no longer a necessary ingredient of the theory of recovery. And even the persuasiveness of Lord Sumner in *Sinclair v. Brougham*[37] could hardly convince us that the House of Lords had done less than resuscitate it.

After all, its only purpose was a procedural one, to let the action of indebitatus assumpsit be available for the type of situation involved. Once that had been done, it could easily have dropped out without the need of an innovator like Lord Mansfield to make the change. But once forms of action were abolished there was no conceivable purpose for it to serve.

And, whether or not we accept Mr. Jackson's view that a fiction as such is not harmful, we must decide that this particular fiction is much more injurious than Mr. Jackson depicts. Its fault is not merely to result in such decisions as *Sinclair v. Brougham* and to make doubtful the whole question of liability of infants and insane persons for necessaries. It also keeps all of the old procedural limitations before the mind of the court, tends to lead the court into adopting rigid, detailed rules, and attempts to blind the court to the broad principles upon which recovery should be allowed. It fosters the view that the relief is truly contractual and thus causes such decisions as those refusing to allow a plaintiff to rescind for fraud and recover the value of goods before they were to be paid for, because "the law will not imply a contract where there is already one in existence."[38] Against this indictment it can offer no defense whatever. Why should we retain it or even view its supposed presence with complacency?

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[33]Hanbury, *supra* n. 24, at 35.

[34]Hamilton, L. J., in Baylis v. Bishop of London [1913] 1 Ch. 127, 140 (C. A.).

[35]9 M. & W. 54, 152 Eng. Rep. 24 (Ex. 1841).

[36]44 Ch. D. 94 (C. A. 1890).

[37][1914] A. C. 347. It is interesting to note that in spite of the fact that the American cases on quasi-contracts are generally considered to be more liberal than the English cases, they make much more frequent reference to the fiction than the English cases preceding Sinclair v. Brougham. For this reason, it may be that they provide more justification for Mr. Jackson's view than the cases which he is discussing. But, of course, most of the American cases recognize that the promise is fictitious in the strictest sense of the term and refuse to allow it to impose limitations upon recovery.

[38]*Cf.* A. L. C. [orbin], Note (1919) 28 YALE L. J. 255.

Mr. Jackson closes his book with a discussion of the name "quasi-contract."[39] His conclusion is the usual one, that the term is not satisfactory, but that other suggested terms offer even more difficulties. And, so long as he is restricting his subject to the material included in this book, he is probably correct.[40]

The book as a whole is scholarly, entertaining and mildly stimulating. I am sure we shall look forward with eagerness to Mr. Jackson's promised treatise on the present-day law of quasi-contract in England.

*John W. Wade**

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[39] § 32.
[40] But *cf.* Costigan, *Constructive Contracts* (1907) 19 GREEN BAG 512.
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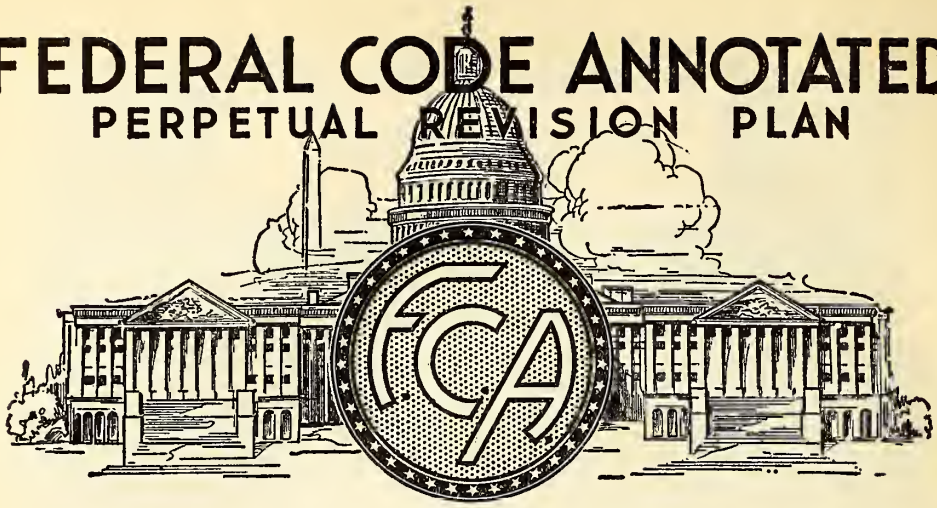

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